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IN THE
COURT OF APPEALS OF INDIANA

Duke Energy Indiana, LLC,
Appellant-Defendant/Counterclaimant,

v.

City of Noblesville, Indiana,
Appellee-Plaintiff/Counter-Defendant.

December 8, 2022

Court of Appeals Case No. 21A-PL-1563

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-2009-PL-6389

Weissmann, Judge.

[1] Duke Energy Indiana LLC lost its battle with the City of Noblesville concerning whether Duke must follow Noblesville's Unified Development Ordinances (UDO) in two unrelated building projects on separate parcels of land owned by Duke. The "Substation Project" required Duke to demolish a residential home and garage in order to build a new utility substation. The "Garage/Office Project" involved construction of a seven-bay heavy equipment storage garage with attached offices.

[2] Finding Duke must follow Noblesville's ordinances, the trial court then imposed more than $500,000 in penalties, attorney fees, and interest arising from Duke's intentional decision to raze the residential home and garage without first obtaining a demolition permit.

[3] On appeal, Duke claims it is not subject to local ordinances unless the Indiana Utility Regulatory Commission (IURC) says it is. Duke argues that if Noblesville wished to challenge Duke's non-compliance, Noblesville needed to

file a complaint with the IURC, rather than the trial court. We reject Duke's view that this matter needed to be litigated before the IURC. We also reject the view that the IURC's authority over utility matters is virtually unlimited and affirm the trial court's judgment in all respects. However, we remand the case for further proceedings concerning the amount, if any, of appellate fees owed by Duke to Noblesville under the UDO.

Facts[1]

[4] Duke informed Noblesville in June 2020 of its plans to demolish an existing home and garage to build a transmission substation. Noblesville requested that Duke consider other sites, but Duke ultimately determined it would proceed with its plans. Noblesville insisted that Duke comply with the city's Unified Development Ordinances (UDO) in demolishing the house and garage.[2] The UDO contains developmental restrictions relating to, among other things, zoning, architecture, landscaping, environmental standards, setbacks, demolition, building codes, and signs.

[5] Duke refused to submit to the UDO's demolition permit process and began demolishing the home and garage without the necessary permit. Noblesville issued a stop order, demanding that Duke cease its demolition work. The next

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[1] We conducted oral argument in this case on October 11, 2022. We thank counsel for their able presentations. We also thank the Indiana Energy Association, Accelerate Indiana Municipalities, and the Indiana Municipal Lawyers Association for their submissions as amici curiae.

[2] Noblesville does not seek Duke's compliance with the UDO when constructing the transmission substation.

day Duke advised Noblesville that it would not seek building or location permits for this project. Duke also informed Noblesville of a second planned project to build a seven-bay heavy equipment storage garage with attached offices.

[6] Noblesville immediately filed a *Verified Complaint to Enforce Ordinance and for Declaratory and Injunctive Relief* (the Complaint) in the Hamilton Superior Court.[3] Noblesville asked the court to require Duke to obtain a UDO demolition permit before continuing the demolition for the Substation Project. It also asked the court to require Duke to obtain location improvement and building permits for the Garage/Office Project and for any "non-substation improvements" for the Substation Project. App. Vol. II, pp. 48-50, 52-54. Noblesville also sought attorney fees, costs, and penalties for Duke's ongoing failure to obtain the demolition permit.

[7] Duke counterclaimed, also seeking declaratory and injunctive relief. It requested the trial court rule that Noblesville "lacks jurisdiction and authority to seek to regulate the activities of [Duke]" on both of the two projects. *Id.* at 95.

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[3] In its Complaint, Noblesville alleged that Duke first informed Noblesville that Duke would build a transmission substation on the Substation Project property, but that Duke later reported that it would build the garage/office building there. App. Vol. II, pp. 47-49, ¶¶ 1, 5, 16. In its answer/counterclaim, Duke denied that the garage office building would be built on the Substation Project property. *Id.* at 82. Instead, the garage/office building would be built on the Garage/Office Project property, according to Duke, and a substation would be built on the Substation Project property. *Id.* at 82, 91-92. Duke repeated those allegations in its summary judgment filings. *Id.* at 123-125, 142; App. Vol. III, pp. 5, 9-10; App. Vol. IV, p. 196. The trial court ultimately found that Duke intended to build the garage/office building on the Garage/Office Project property. App. Vol. II, p. 12.

Duke also sought an injunction barring Noblesville from imposing local building ordinances and regulations on Duke as it develops the two sites.

[8] The parties agreed to a special judge, who assumed jurisdiction. Both parties then moved for summary judgment. After a hearing, the trial court granted Noblesville's motion for summary judgment and denied Duke's. In its detailed findings of fact and conclusions of law, the court found it had jurisdiction over Duke's claim.

[9] The court ordered Duke to comply with Art. 4, Part F, Section 4 of the UDO by obtaining a demolition permit for the Substation Project. As to the Garage/Office Project, the court ordered Duke to comply with the UDO by obtaining an improvement location permit under Art. 4, Part F, Section 1, and a building permit under Art. 4, Part F, Section 2, before beginning construction. The court also imposed a penalty of $150,000 for Duke's failure to obtain a demolition permit before razing the home and garage on the substation site. After a later hearing, the court also awarded to Noblesville attorney fees, costs, expenses, and expert fees totaling $115,679.10. Duke appeals.[4]

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[4] Noblesville moved to strike portions of Duke's brief, and our motions panel referred Noblesville's motion to this panel for decision. Noblesville alleges that Duke improperly inserts argument in its statement of the facts. Noblesville also argues that Duke supports some of its assertions in its statement of facts with citations to the argument section of Duke's summary judgment briefs.

Duke contends it merely provided the historical context for this case in its statement of facts and, in so doing, followed instructions given at an Appellate Judges Education Institute program on "storytelling" for advocates and judges. We remind counsel that all portions of briefs filed in the Indiana appellate courts still must track our appellate rules. Indiana Appellate Rule 46 and our precedent make clear that argument may not be inserted in the statement of facts and that supportive citations to authority or to the record are

Discussion and Decision

[10] Duke raises two primary arguments. First, it claims that the trial court erred in enforcing the UDO against Duke because only the IURC can enforce such local ordinances against Duke. Second, Duke contends the trial court erroneously ordered Duke to pay the penalties and Noblesville's defense costs.

[11] We conclude that Duke's demolition work at the substation site and construction work at the garage/office site do not fall within the IURC's exclusive statutory purview. We also conclude that the trial court did not abuse its discretion in imposing the penalties and defense costs.

I. General Standard of Review

[12] As this is an appeal from summary judgment, the standard applicable in the trial court also governs on appeal. *Harradon v. Schlamadinger*, 913 N.E.2d 297, 300 (Ind. Ct. App. 2009); Ind. Trial Rule 56(C). Considering only the designated evidence, this Court will affirm summary judgment when no genuine issue of material fact exists and the moving party is entitled to summary judgment as a matter of law. *Harradon*, 913 N.E.2d at 300.

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required. *See, e.g.*, *In re Garrard*, 985 N.E.2d 1097, 1104 (Ind. Ct. App. 2013) (finding appellant waived his appeal by, among other things, failing to provide citations to the record for factual assertions and including argument in his statement of the facts). A party's citations to its own argument in the trial court establishes only the existence of that argument in the trial court and not the accuracy of the factual assertions within that argument. We therefore grant Noblesville's motion to strike in part. We consider any argument in Duke's statement of facts as argument, even if disguised as facts. We do not consider Duke's factual assertions that lack sufficient citations either to the authority or to the record.

[13] The parties agree that whether the IURC or the trial court is the proper adjudicator of these claims turns on statutory interpretation and thus is a question of law for this Court. *See Duke Energy Ind., LLC v. Town of Avon*, 82 N.E.3d 319, 324 (Ind. Ct. App. 2017).[5]

II. Trial Court's Authority to Enforce UDO

[14] As to the issue of the trial court's authority to enforce the UDO against Duke, the parties agree that one issue is dispositive: whether Duke's demolition of the home for the Substation Project or the construction in the Garage/Office Project involves utility "service" or the location and use of a utility "facility." If so, the parties agree that the applicable statutes and our precedent dictate that the IURC has control over this dispute.

[15] We conclude that Duke's demolition of the existing home and garage and its construction of the combined garage/office building involved neither utility "service" nor the location and use of a utility "facility." Those projects therefore do not fall within the IURC's exclusive domain, leaving the trial court with

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[5] When all issues presented in a complaint fall within the exclusive jurisdiction of the relevant administrative or regulatory agency, the trial court lacks subject matter jurisdiction over the complaint. *Town of Avon*, 82 N.E.3d at 324. Duke views the trial court as having subject matter jurisdiction over Noblesville's complaint and Duke's counterclaim. *See generally* Ind. Code § 34-14-1-1 *et seq.* (Declaratory Judgment Act granting trial court power to determine rights, status, and other legal relations of the parties as to the named parties); Ind. Code § 36-1-6-4 (granting trial court jurisdiction over Noblesville's civil action for ordinance violation). Duke seems to contend only that the trial court lacked authority to grant the relief Noblesville sought: that is, enforcement of any local ordinances against Duke. That power, according to Duke, belongs exclusively to the IURC. Our ultimate decision that the trial court has such enforcement authority negates any issue of subject matter jurisdiction, so we do not address Duke's contentions on that issue.

authority to resolve this dispute and enforce the UDO against Duke in the limited manner ordered.

A. Scope of the IURC's Authority

[16] The overriding theme of Duke's argument is that the Indiana General Assembly has granted the IURC virtually unlimited exclusive jurisdiction over disputes involving public utilities.[6] But the IURC's jurisdiction over public utility matters is not as broad as Duke alleges. The General Assembly created the IURC mainly as a fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature. *United Rural Elec. Membership Cor. v. Ind. & Mich. Elec. Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990). The IURC's task is to ensure that public utilities provide constant, reliable, and efficient service to Indiana citizens. *Ind. Bell Tel. Co. v. Ind. Util. Regul. Comm'n*, 715 N.E.2d 351, 354 n.3 (Ind. 1999), *citing Office of Util. Consumer Couns. v. Pub. Serv. Co. of Ind., Inc.*, 463 N.E.2d 499, 503 (Ind. Ct. App. 1984).

[17] Any number of public utility matters do not require the IURC's expertise to resolve. For instance, no one reasonably would challenge a municipality's authority to enforce speeding ordinances against public utility employees

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[6] When Duke's counsel was asked at oral argument to specify a Duke activity over which the IURC would *not* have control, Duke's counsel offered only one specific example: when Duke operates as a commercial vendor providing electricity to private parties, rather than as a utility providing service to Indiana residents. However, Duke's counsel suggested the IURC would govern all of Duke's activities except those specifically exempted by statute and that those unspecified statutory exceptions would encompass more than just Duke's actions as a commercial vendor.

driving utility trucks even if the employees were providing utility service at the time. And Duke's own actions diverge from its claims of virtually unchecked IURC control. Since 2010, Duke has applied for and obtained from Noblesville several permits, including at least one improvement location permit, for work at the Garage/Office Project property. App. Vol. VI, p. 116.

[18] Accordingly, we reject Duke's claim that the IURC has sole authority over this ordinance dispute simply because the IURC allegedly has authority over virtually every utility dispute.

B. IURC Versus Municipal Authority

[19] As the IURC's authority over disagreements involving public utilities is not absolute, we must determine whether the ordinance dispute between Duke and Noblesville falls within the IURC's purview.

[20] For more than a century, the IURC has controlled the manner in which utilities operate. *See City of Huntington, et al., v. N. Ind. Power Co.*, 5 N.E.2d 889, 892 (Ind. 1937). "The [IURC's] assignment is to ensure that public utilities provide constant, reliable, and efficient service to the citizens of Indiana." *IPL Indus. Grp. v. Indianapolis Power & Light Co.*, 159 N.E.3d 617, 622 (Ind. Ct. App. 2020). But the IURC can only exercise power granted to it by statute. *United Rural Elec. Membership Corp.*, 549 N.E.2d at 1021. "Any doubts regarding the [IURC's] statutory authority must be resolved against the existence of such authority." *NIPSCO Indus. Grp. v. N. Ind. Pub. Serv. Co.*, 31 N.E.3d 1, 5 (Ind. Ct. App. 2015).

[21] Until 1980, municipalities had similar limitations on their authority, possessing only those powers expressly authorized by statute. *City of Gary v. Ind. Bell Tel. Co.*, 732 N.E.2d 149, 153 (Ind. 2000). The Home Rule Act, enacted by the General Assembly in 1980, changed that traditional rule. *Id.*; Ind. Code § 36-1-3-4(a). A municipality now has "(1) all powers granted it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute." Ind. Code § 36-1-3-4(b). With limited exception not applicable here, a municipality "may exercise any power it has to the extent that the power: (1) is not expressly denied by the Indiana Constitution or by statute; and (2) is not expressly granted to another entity." Ind. Code § 36-1-3-5(a).

[22] The General Assembly has granted municipalities the power to "regulate conduct, or use or possession of property, that might endanger the public health, safety, or welfare." Ind. Code § 36-8-2-4. A municipality also has the power to enforce its ordinances. Ind. Code § 36-1-4-11. Accordingly, Noblesville has authority to enforce its UDO against Duke unless the General Assembly has "expressly granted" that authority to the IURC. *See id.*; Ind. Code § 36-1-3-4(b), -5(a); *United Rural Elec. Membership Corp.,* 549 N.E.2d at 1021. To resolve this dispute, we essentially must draw the line between Home Rule authority and IURC control. We are guided in this analysis by a trio of statutes.

i. IURC Statutes Relating to Ordinance Enforcement

[23] We first turn to Indiana Code § 8-1-2-115. This statue specifies that the IURC "shall inquire into any . . . violation of the . . . ordinances of any city or town by any public utility doing business therein . . . and shall have the power, and it shall be its duty, to enforce this chapter, as well as all other laws, relating to public utilities."[7]

[24] The second statute is Indiana Code § 8-1-2-54, which tasks the IURC with investigating, "as it may deem necessary or convenient," specific types of complaints made by a "municipal organization" against any public utility. Included as a type of complaint are those alleging "that any regulation, measurement, practice or act whatsoever *affecting or relating to the service of any public utility*, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory." Ind. Code § 8-1-2-54 (emphasis added).

[25] After the IURC conducts an investigation under Indiana Code § 8-1-2-54, the third statute comes into play—Indiana Code § 8-1-2-69. This statute requires the IURC to

> determine and declare and by order fix just and reasonable measurements, regulations, acts, practices, or service to be

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[7] Noblesville claims that Duke has waived any reliance on Indiana Code § 8-1-2-115 by failing to raise it in the trial court. But Duke cited the statute in its brief in support of its motion for summary judgment, arguing that it and other statutes granted the IURC exclusive authority over the ordinance dispute between Noblesville and Duke. Appellant's App. Vol. II, pp. 135-36. We find no waiver.

> furnished, imposed, observed, and followed in the future in lieu of those found to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this chapter, as the case may be, and shall make such other order respecting such measurement, regulation, act, practice, or service as shall be just and reasonable.

Ind. Code § 8-1-2-69.

[26] We have recognized that Indiana Code § 8-1-2-115 is part of a "uniform system" for evaluating and enforcing local ordinances. *Town of Avon*, 82 N.E.3d at 325 (referring to Indiana Code § 8-1-2-101(a) and -115). This system grants the IURC authority over disputes between a public utility and a municipality over enforcement of ordinances when "the location and use of utility facilities" is involved. *Darlage v. E. Bartholomew Water Corp.*, 379 N.E.2d 1018, 1021 (Ind. Ct. App. 1978) (ruling before enactment of Home Rule statutes that IURC has authority over ordinance violations arising from location and use of utility facilities because such regulations might infringe on utility service). Additionally, Indiana Code § 8-1-2-54 expressly grants the IURC authority over ordinance disputes between a public utility and a municipality when the ordinance affects or relates to the utility's service.

[27] Given this express grant of authority, the parties agree, and we conclude, that Noblesville could not enforce its ordinances against Duke without IURC involvement if the dispute involves "the location and use of utility facilities." *Howell v. Ind. Am. Water Co.*, 668 N.E.2d 1272, 1275 (Ind. Ct. App. 1996), *citing Darlage*, 379 N.E.2d at 1021. The parties also agree, and we conclude based on

Indiana Code § 8-1-2-54, that disputes that affect or relate to the utility's "service" are within the IURC's exclusive jurisdiction.

ii. "Location and Use of Utility Facilities"

[28] The parties disagree about the meaning of "location and use of utility facilities." "Utility facility" is not defined in Indiana Code Chapter 8-1-2. Borrowing from Chapter 8-1-2.4, which addresses specialized energy production, Duke argues that "facility," in this utility context, means "any land, system, building, or improvement that is located at the project site and is necessary or convenient to the construction, completion, or operation of the facility." *See* Ind. Code § 8-1-2.4-2(b)(2), (c)(2), and (e)(2).

[29] The trial court rejected that definition, noting it is used only to describe "specialized types of energy facilities not at issue here." App. Vol. II, p. 29. That definition appears in the Indiana Code only in one utility statute: Indiana Code § 8-1-2.4-2, which is not at issue here. And within Indiana Code § 8-1-2.4-2, the definition appears when describing "Alternative energy production facility," "Cogeneration facility," and "Small hydro facility," none of which are involved here. Ind. Code § 8-1-2.4-2(b)(2), (c)(2), and (e)(2). The trial court concluded:

> [I]n defining those facilities, the Indiana legislature distinguishes between the power-generating "facility" (see I.C. § 8-1-2.4-2(b)(1), (c)(1), and (e)(1)), and the "land, system, building, or improvement that is located at the project site" that is necessary or convenient for "construction, completion, or operation of the facility" (see I.C. § 8-1-2.4-2(b)(2), (c)(2), (e)(2)). The terms "land,

> system, building, or improvement," "project site," and "facility" are distinct terms with different meanings. Throughout the Indiana Code, "facility" refers to the actual power-generating or transmitting source. [Duke] incorrectly suggests that "facility" means the "land, system, building, or improvement" on a "project site." While that definition does extend to those specialized energy facilities in Section 8-1-2.4-2, it has not been extended to a residence, garage, and stand-alone parking garage and office building.

App. Vol. II, pp. 29-30. Based on its analysis, the trial court determined that neither the house and garage to be demolished in relation to the Substation Project nor the garage/office building planned for the Garage/Office Project were utility "facilities." App. Vol. II, pp. 18, 30-31, 33.

[30] Duke contends the trial court incorrectly interpreted "facility" to mean only generation facilities or transmission lines because that definition is too restrictive and inconsistent with precedent. Duke notes that a "utility" means "every plant or equipment within the state used for . . . the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly to the public." Ind. Code § 8-1-2-1(g)(2).

[31] Duke essentially argues that the demolition for the Substation Project necessarily involves the location and use of a utility facility because the demolition is the first stage in building a transmission substation there. Duke also contends the dispute over construction of the buildings related to the Garage/Office Project also involves the location and use of a utility facility

because that structure will be used to improve Duke's response to necessary utility maintenance and repairs throughout the region.

[32] In response, Noblesville argues that a "utility facility" means "a structure specific and unique to a utility." Appellee's Brief, p. 26. Such an interpretation, according to Noblesville, follows precedent and statutes describing utility facilities. *See U.S. Gypsum, Inc. v. Ind. Gas Co.,* 735 N.E.2d 790, 802 (Ind. 2000) ("Where statutes address the same subject, they are in *pari materia*, and we harmonize them if possible."); *see also* Ind. Code §§ 8-10-1-8, -15-2-6(e), -21-9-18 (referring to "public utility facilities" collectively as "tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances"); Ind. Code § 8-10-5-3 (distinguishing between "building and appurtenances" and "public utility facilities for power, light, heat or water").

[33] With that framework in mind, Noblesville contends that the demolition of an existing residential home does not involve the location and use of a utility facility. It argues that the UDO's demolition permit process merely ensures that the property is properly remediated, any environmental contaminants are properly handled, and the public is protected. Similar public protections are the purpose of Noblesville's enforcement of building and fire codes against Duke as it builds the garage/office structure, according to Noblesville. We will address each project separately.

a. Substation Project

[34] Noblesville is not interfering with Duke's decision to locate and use the transmission substation—arguably, a utility facility—on the Substation Project property. It is merely requiring Duke to adhere to local demolition requirements when razing existing residential buildings—clearly, not utility facilities, for the reasons stated by the trial court—on that utility-owned property. Enforcing the demolition requirements will not impact either Duke's location or use of the transmission substation that Duke intends to build. Instead, Duke simply will be made to adhere to generally applicable safety guidelines when it is eliminating existing, non-utility facilities unnecessary to its operation.

b. Garage/Office Project

[35] The garage/office construction presents a closer question. In arguing for a broad definition of utility "facility," Duke relies on three appellate decisions: *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 233 N.E.2d 656 (Ind. 1968); *Darlage v. E. Bartholomew Water Corp.*, 379 N.E.2d 1018 (Ind. Ct. App. 1978); and *Howell v. Ind. Am. Water Co.*, 668 N.E.2d 1272 (Ind. Ct. App. 1996). Duke contends that *Graham Farms*, *Darlage*, and *Howell* require reversal here because they involved a municipality's objections to a utility's construction project and the municipality's attempts to enforce local ordinances to control or stop the project. And in each of the three decisions, the municipalities were not allowed to obtain relief from the courts.

[36] But Noblesville considers these same three cases supportive of its contrary position. Noblesville notes the demolition of a vacant home is far different from the "utility facilities" found in those cases: a high voltage electric transmission line in *Graham Farms*, a water production well site in *Darlage*, and an elevated water storage tank in *Howell.*

[37] We conclude, as the trial court did, that the garage/office building to be constructed is not a "utility facility." The structure, as planned, easily could be occupied by any number of businesses. No utility power will be generated there. Duke's assertion that it need not seek approval from the IURC before building the garage/office also suggests that the structure is not a utility facility, given the breadth of IURC supervision of public utilities.

[38] Duke's suggestion that Noblesville will use the UDO unreasonably to block actual utility facilities is speculative. And we note that although Noblesville's unhappiness with the location of the planned transmission substation is undisputed, Noblesville still granted the demolition permit once Duke properly applied for it.

iii. Utility "Service"

[39] Duke also asserts that both projects relate to utility "service" and, thus, any ordinance issues must be determined by the IURC. *See* Ind. Code § 8-1-2-54. Duke bases this expansive view of Indiana Code § 8-1-2-54 on the General Assembly's broad definition of utility "service":

> "Service" is used in this chapter in its broadest and most inclusive sense and includes not only the use or accommodation afforded consumers or patrons but also any product or commodity furnished by any public or other utility and the plant, equipment, apparatus, appliances, property, and facility employed by any public or other utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public or other utility is engaged and to the use and accommodation of the public.

Ind. Code § 8-1-2-1(e).

[40] Noblesville agrees that Indiana Code § 8-1-2-54 confers exclusive jurisdiction of some utility disputes on the IURC, but it offers a narrower interpretation of Indiana Code § 8-1-2-54 than Duke. Indiana Code § 8-1-2-54, in this context, only applies to "a practice or act 'affecting or relating to the service of any public utility,'" according to Noblesville. Appellee's Br., p. 22 n. 7. Noblesville argues that it "is not challenging an act 'affecting or relating to the service,' but rather [Duke's] attempts to avoid local rules of general applicability that do not control [Duke's] utility service." *Id.*

[41] Duke argues that the maintenance of the transmission lines is critical to providing utility "service," and the Garage/Office Project is an essential part of timely maintenance. Likewise, Duke considers the demolition of the existing structures for the Substation Project as equivalent to constructing a transmission substation, a facility which directly relates to utility "service." Duke urges this Court to find that both the transmission substation and the garage/office construction fall within the statutory scope of "furnishing . . . directly or

indirectly" utility "services" and "facilities." *See* Ind. Code § 8-1-2-1(e). This would mean that Noblesville is precluded from obstructing such service through local enforcement of zoning ordinances and building codes.

[42] Accusing Duke of viewing "service" too broadly, Noblesville maintains that demolition of a home does not relate to utility "service." Neither does the garage/office project, according to Noblesville, because the planned building simply is a parking facility for heavy equipment and a general office structure. We agree with Noblesville.

[43] The demolition of unnecessary residential structures for the Substation Project does not relate directly or indirectly to utility "service." *See* Ind. Code § 8-1-2-1(e). The residential buildings are not facilities "employed by any public or other utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public or other utility is engaged and to the use and accommodation of the public." *Id.* The mere fact that the buildings are on land on which Duke plans to build a transmission substation is too tangential to establish that the demolition of the structures directly or indirectly relates to utility "service."

[44] As to the Garage/Office Project, ensuring that the construction meets certain local standards aimed largely at preserving public safety and welfare does not impact directly or indirectly utility "service." For instance, requiring Duke to adhere to the local building or fire codes when constructing the garage/office will not impact Duke's ability to launch maintenance crews and equipment

from that structure once it is completed. Duke simply will be held to the same generally applicable building standards as other entities building garage or office structures in that municipality. Considering Duke's position that IURC has exclusive control over utility "service," Duke's contention that it will not, and need not, seek IURC approval of the garage/office construction supports our conclusion that this project does not directly or indirectly relate to utility "service." Accordingly, Duke has failed to establish that the trial court erred in finding that the trial court lacked authority to order that Duke comply with: 1) Art. 4, Part F, Section 4 of the UDO as to the demolition related to the Substation Project, and 2) Art. 4, Part F, Sections 1 and 2 before constructing buildings for the Garage/Office Project.

[45] If we were to rule otherwise, Duke could proceed to construct the garage/office without oversight by any governing body, given its failure to seek IURC approval and its eschewal of municipal oversight. But even Duke concedes that it is governed by state and federal building and fire codes. Although Duke suggests only state and federal entities may enforce building and fire codes against Duke, the General Assembly has specifically tasked municipalities with that duty. *See* Ind. Code § 36-7-2-9 (mandating municipalities "require compliance with . . . the code of building laws and fire safety laws that is adopted in the rules of the fire preventing and building safety commission under IC 22-13 . . . ."). Duke offers no logical reason why it should be immune from fire and building code enforcement for new construction projects that Duke asserts are not subject to IURC approval or supervision.

[46] For these reasons, we affirm the trial court's declaratory judgment finding Duke was subject to demolition permit, improvement location permit, and building permit requirements in the UDO, as set forth in that judgment.

III. Penalties and Defense Costs

[47] Duke also challenges the trial court's order requiring Duke to pay $150,000 in penalties and $115,679.10 in Noblesville's costs in enforcing Duke's compliance with the UDO. We conclude that the trial court did not abuse its discretion in either imposing the penalties or awarding the costs.[8]

A. Propriety of Penalties and Defense Cost Award

[48] Duke contends all penalties and awards of Noblesville's costs are improper. The trial court imposed the penalties and defense costs based on a provision in the UDO specifying that "[a]ny person convicted of violating [the UDO]" may be fined and ordered to pay Noblesville's costs and expenses "related to adjudicating the offense." UDO Article 15, Part A, Section 7; *see* Unified Development Ordinance – Document Viewer (encodeplus.com).

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[8] Citing only to the trial court's summary judgment order, issued July 15, 2021, Duke asserts that Noblesville proceeded to impose another $225,000 in penalties from the date of the summary judgment hearing (June 22, 2021) through the date of Duke's application for the demolition permit (July 22, 2021). Appellant's Br., p. 23. But neither the trial court's orders nor the record before this Court reflects $225,000 in new penalties. Instead, the summary judgment order only specified that "Noblesville shall be entitled, as a matter of law, *up to $7,500 for each day after June 22, 2021*, that [Duke] delays in applying for a permit." App. Vol. II, p. 37 (emphasis added). The amounts of penalties that Noblesville ultimately charged Duke after June 22, 2021, are not found in the appellate record. We therefore do not address any penalties beyond the $150,000 imposed by the trial court in its summary judgment order. *See* App. R. 46(A)(8) (specifying that facts and arguments in the Appellant's Brief must be supported by appropriate citations to the record or authority).

[49] Reasonable penalties may be imposed by ordinances and statutes, when authorized, to induce compliance with their terms. *Whitewater Valley Canoe Rental, Inc. v. Bd. of Franklin Cnty. Comm'rs*, 507 N.E.2d 1001, 1009 (Ind. Ct. App. 1987). Whether a penalty is reasonable or excessive must be determined based on the particular circumstances. *Id.*

[50] Duke contends that "conviction," as used in the UDO, means "the act or process of judicially finding someone guilty of a crime" or "the judgment (as by a jury verdict) that a person is guilty of a crime." Appellant's Br., p. 54 (citing *Black's Law Dictionary*, *Conviction* (11th ed. 2019)). Duke asserts that it could be "convicted of violating" the UDO only if Noblesville had filed a Local Ordinance Violation under Indiana Administrative Rule 8(B)(3). Instead, Noblesville filed a civil plenary action, which Duke contends could not generate a "conviction" justifying penalties or awarding defense costs under the UDO.

[51] But Duke appears to elevate form over substance. As Noblesville notes, the General Assembly has provided specific means for municipalities to enforce local ordinances, and the courts have ruled that ordinance enforcement is a civil action. *See* Ind. Code §§ 36-1-4-11, -6-3, -6-4; *Boss v. State*, 944 N.E.2d 16, 21-23 (Ind. Ct. App. 2011). Noblesville sued under Indiana Code § 36-1-6-4, which allows a municipality to "bring a civil action . . . if a person . . . violates an ordinance regulating or prohibiting a condition or use of property" or "engages in conduct without a license or permit if an ordinance requires a license or permit to engage in the conduct." This statute also authorizes a trial court in such an action to impose a penalty not to exceed $2,500 for the first ordinance

violation and $7,500 for "a second or subsequent violation" as well as "court costs and fees" consistent with statute. Ind. Code § 36-1-6-4(b)(8)-(9); *see also* Ind. Code § 36-1-3-8(a)(10)(B).

[52] Noblesville followed the enforcement process dictated by this Court and by statute. *See Boss*, 944 N.E.2d at 23 (ruling that "[a]n action to enforce an ordinance begins with a complaint and summons, must conform to the Indiana Rules of Trial Procedure, and the plaintiff's case need only be proved by a preponderance of the evidence"). Duke does not address *Boss* in its reply brief. But *Boss* and Indiana Code § 36-1-6-4 control here.

[53] Although Duke cites appellate decisions where ordinance enforcement was accomplished through an administrative proceeding, *Boss* and Indiana Code § 36-1-6-4 authorize enforcement through a civil proceeding such as that filed by Noblesville. Therefore, we reject Duke's claim that the trial court's award of attorney fees and penalties was improper because Noblesville filed a civil, rather than an administrative, action.

B. Alternative Argument as to Propriety of Penalties

[54] Although Duke does not otherwise contest the propriety of the award of attorney fees and costs, it does challenge the penalties on other grounds. Duke first claims that it acted in good faith in refusing to obtain the permits and thus should not be penalized. Duke particularly notes that it submitted its demolition permit application to Noblesville less than a week after receiving the trial court's order.

[55] But Duke cites no authority to support its position that alleged good faith bars penalties or that the increase in penalties for continuing violations was inappropriate. It has thus waived those claims. *See Carter v. Indianapolis Power & Light Co.,* 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) ("A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.").

[56] Waiver notwithstanding, Duke has failed to prove its good faith. It began demolishing the home and garage for the Substation Project despite a pending dispute with Noblesville over the need for a demolition permit and without seeking approval of any governing entity. If it believed the IURC had exclusive authority over the dispute, Duke could have filed a complaint with the IURC. It chose, instead, to flout the UDO and only applied for the permit after the trial court ruled in Noblesville's favor many months later. The trial court did not abuse its discretion in imposing the penalties or in awarding Noblesville's costs in enforcing the ordinance.

IV. Appellate Attorney Fees

[57] Noblesville asks this Court to grant appellate attorney fees. Because these defense costs are authorized by the UDO, we remand to the trial court for a determination of the amount, if any, of appellate fees that Duke should pay Noblesville under the UDO.

[58] We affirm the trial court's judgment and remand for further proceedings related only to appellate fees.

Robb, J., and Pyle, J., concur.