STATE OF INDIANA
IN THE DELAWARE CIRCUIT COURT 5

RHETT AND ALANA LIGHT, Petitioners, V. DELAWARE-MUNCIE METROPOLITAN BOARD OF ZONING APPEALS Respondent and Defendant, KEVIN CHAMBERS, KATHY CHAMBERS, STEPHEN DRISCOLL, ELIZABETH DRISCOLL, PERRY EVANS AND TONYA EVANS, Intervenors.	)	CAUSE NO. 27C01-1811-PL-00049

INTERVENORS' BRIEF IN OPPOSITION TO PETITION FOR JUDICAL REVIEW

I. Introduction

Petitioners Rhett and Alana Light ("Petitioners") have not met their burden on judicial review and have not provided any evidence or argument to warrant this Court's reversal of the Delaware-Muncie Metropolitan Board of Zoning Appeals' (BZA") decision to grant the Application for Appeal of Intervenors, Kevin and Kathy Chambers, Stephen and Elizabeth Driscoll, and Perry and Tonya Evans ("Intervenors Appeal") that voided the building permit issued to Gailon Light—a building permit that would have allowed Rhett Light to construct a large concentrated animal feeding operation ("CAFO") in a zoning district where such industrial land uses are not allowed.

Contrary to Petitioners' revisionist version of events, the BZA conducted a full hearing on the matter wherein attorneys for Intervenors and Petitioners were given equal and ample opportunity to present evidence and argument for and against Intervenors'

Appeal. Prior to the hearing, Steve Minnick, the Delaware County Building Commissioner/Zoning Administrator ("Zoning Administrator") submitted his report to the BZA stating the basis for his decision to issue the building permit. Both Intervenors and Petitioners submitted extensive written materials and evidence for the BZA's consideration. And, at the hearing the BZA members asked questions of both Parties. After considering the evidence and argument, the BZA voted to grant Intervenors' Appeal and void the building permit finding that the Light CAFO is an industrial agricultural land use that is not a permitted use in the "F-Farm Zone" under Article XII of the Delaware County Zoning Ordinance ("Zoning Ordinance"). The BZA's decision is based on its reasonable interpretation of the Zoning Ordinance and is supported by substantial evidence in the record.

Petitioners may disagree with the BZA's determination but that is not enough to overturn it. Rather, Petitioners have the heavy burden of demonstrating that the BZA abused its discretion, acted arbitrarily and capriciously, or failed to follow the law. Petitioners have demonstrated none of these things. Instead, they have chosen to concoct a vast conspiracy theory, falsely accuse the BZA's attorney of misconduct without any evidence for making such a serious claim, and raise irrelevant and meritless arguments to confuse and distract. Putting these regrettable tactics aside, there is simply no evidence or legal grounds to support Petitioners' claims. Accordingly, this Court should reject them and uphold the BZA's decision.

II. Summary of Argument

First, Petitioners' contention that its industrial-scale CAFO is somehow the same thing as a "farm" is contrary to common sense, the overwhelming evidence presented to

the BZA, the plain terms of the zoning ordinance, and Indiana law. Second, Petitioners' assertion that the BZA lacked jurisdiction to hear Intervenors' Appeal contradicts the express language of the zoning ordinance and the Indiana Code which both squarely place authority with the BZA to determine appeals of Zoning Administrator decisions that involve interpretation of the Zoning Ordinance.

Finally, the BZA's attorney, Megan Quirk, did her job. Contrary to Petitioners' view, Ms. Quirk had no reason to recuse herself and did not "taint" the BZA proceedings. There is no evidence that Ms. Quirk or her firm ever represented a Party to this proceeding or other client that would give rise to a conflict requiring her recusal. There is no evidence that Ms. Quirk ever communicated with Intervenors or their counsel outside of her role as BZA attorney. There is no evidence that Ms. Quirk was even aware of her family members' concerns about the CAFO as expressed to state agency IDEM months before the BZA's involvement, much less any evidence that she agreed with those concerns. And even if such evidence existed, there is not a shred of evidence that Ms. Quirk communicated those concerns to any BZA member, did anything improper to influence a BZA members' vote, or failed to use her sound legal judgment in advising the BZA. Simply put, Megan Quirk's personal views, whatever they are, and those of her family were not communicated to the BZA and did not influence the BZA's decision. Petitioners' quest to contrive a due process violation by running roughshod over Ms. Quirk's reputation is an unfortunate and misleading side show that should be rejected by this Court.

III. The Facts Support the BZA's Decision

Petitioners present a revisionist version of the facts and rely on irrelevant evidence outside the record that was not before the BZA. The actual record and relevant evidence before the BZA is as follows.

On December 12, 2017, Rhett Light submitted a permit application to the Indiana Department of Environmental Management ("IDEM") to construct and operate a large CAFO with 10,560 "wean to finish" hogs in four "production buildings" each with underground waste pits to collect an estimated 4.2 million gallons of hog feces and process wastewater. (Transcript at 6-7; BZA Record Exh. I) Rhett Light proposed to build the CAFO on vacant crop land he does not own at 2601 West County Road 1270 North in Muncie, Indiana (the "CAFO Site"). (Transcript at p. 3; BZA Record Exh. I, L) The CAFO Site is in the middle of an established residential community of approximately 200 homes within one (1) mile and forty- five (45) households within a half-mile. (Transcript at 7; Intervenors' Memorandum in Support of Application for Appeal at p. 1, attached hereto as Exhibit 1).

Public notice of Rhett Light's permit application to IDEM drew significant public opposition and concern about the detrimental impacts the CAFO would have on quality of life, the environment, and property values. (BZA Record, Exhs. J, K; Exh. 1 at p. 2). When citizens raised these concerns to County officials, they were advised that the County's Zoning Ordinance lacked any requirements for CAFOs. (Transcript at 19; Exh. 1 at p. 2). Indeed, Commissioner King explained that, "no one brought it to our attention that there is no [CAFO] regulations in our County" and county attorney John Brooke advised that "a CAFO is not considered an agricultural use" under other county ordinances that he

reviewed. (Transcript at 19; Exh. 1 at p. 2 (citing to archived video of the County Commissioners' meeting of March 19, 2018 at ~24:20-30:50))

Consequently, in February of 2018, the County Commissioners placed a temporary hold on issuing any new building permits for CAFOs, including for Rhett Light's proposed CAFO, until the Plan Commission and County Commissioners could develop and enact zoning requirements for CAFOs. (Transcript at 23-24; BZA Record, Exhs. K, M) Nevertheless, the CAFO Site owner, Gailon Light, went ahead and submitted an application for a CAFO building permit on March 2, 2018. (BZA Record, Exh. L) On March 7, 2019, the Zoning Administrator confirmed receipt of the application but advised Rhett Light's attorneys that the "Commissioners have placed a temporary moratorium on [CAFO] permits while they address public concerns about their impact on neighboring properties." (BZA Record, Exh. M) And, on March 19, 2018, the County Commissioners voted to "continue the hold" on issuing any new building permits to allow the County time to develop an ordinance for CAFOs. (Transcript 24; BZA Record, Exh. K; Exh. 1 at 2).

This situation took a dramatic turn at the Commissioners' meeting of April 2, 2018. At that meeting, the Commissioners suddenly lifted the nearly three-month temporary hold after Rhett Light's attorneys threatened legal action insisting that the County had no authority to deny him a building permit since IDEM had issued its permit for the CAFO. (Transcript 24-25; Exh. 1 at p. 2 (citing to archived video of the meeting at ~19:30–27:15)). Thereafter, Intervenors' counsel provided the Commissioners with legal authority and explanation for why the Commissioners could continue withholding issuance of CAFO building permits, regardless of Rhett Light's litigation threats, because, among other reasons, CAFOs are not permitted uses in the F-Farm Zone under Article XII of the Zoning

Ordinance. (Transcript 25-26; BZA Record, Exhs. N, O; Exh. 1 at 3) Nevertheless, the Commissioners did not reinstate the hold and on May 17, 2018, the Zoning Administrator issued the building permit for the CAFO to Gailon Light. (BZA Record, Exh. L; Petitioners' Exh. 4).

On June 1, 2018, Intervenors filed their Application for Appeal of the building permit with the BZA pursuant to Article XXXII, Section 5-B-1 of the Zoning Ordinance, and Ind. Code § 36-7-4-918.1, requesting that the BZA void the permit because the zoning administrator had no authority under the zoning ordinance to issue it. (*See* Application for Appeal attached as Exhibit 2) In support, Intervenors provided a detailed legal memorandum (Exh. 1) along with extensive documentary evidence demonstrating that CAFOs are not "farms" within the meaning of Article XII of the Zoning Ordinance. (BZA Record, Exhs. A-G) Specifically, Intervenors provided the following evidence:

- A 2009 report from the U.S. Dept of Agriculture entitled, *Transformation of U.S. Livestock Agriculture,* detailing the strong financial pressures that have led to the transformation of U.S. livestock farms to industrial facilities called CAFOs where high numbers of animals are confined and the waste they produce is concentrated in one area leading to serious air and water pollution concerns. (BZA Record, Exh. E at p. iii) Describing that transformation, the USDA report states:

    - In 1987, half of all hogs marketed came from farms that sold no more than 1,200 hogs annually. By 2002, that number rose to 23,400 and has continued to rise. (BZA Record, Exh. E at p. 6)

    - In 1992, most hogs came from independent farrow to finish operations that combined all stages of production and sold to meatpackers through cash markets where farmers were able to negotiate a price. Today, most hogs come from operations that specialize in single stages of production [i.e. "wean to finish" like the Rhett Light CAFO] and are linked to one another by integrators using production contracts. About 40 major integrators now control production of 75% of the 100 million hogs marketed annually in the U.S. (BZA Record, Exh. E at p. 8)

    - Under this system of vertical integration, the integrator owns and supplies the weaned nursery pigs, the feed and other services, dictates all aspects of how the hogs are to be raised, and pays the grower (the CAFO owner) a flat fee for each hog or hog space. Growers own the land, buildings and costs for constructing and maintaining them, while the integrator owns the hogs and dictates all aspects of

production, leaving the grower responsible for dealing with the massive amount of waste produced. (BZA Record, Exh. E at p. 10)

- Growers and corporate integrators now have little financial incentive to mitigate the harmful effects of livestock industrialization because integrators contract away their liability and growers do not get paid extra for implementing good practices but make more money only by producing more hogs. (BZA Record, Exh. E at p. iv)

- A 2010 report from the National Association of Local Boards of Health and the Centers for Disease Control entitled, *Understanding CAFOs and Their Impact on Communities* concluding based on numerous scientific studies that:

  - CAFOs generate enormous quantities of biological waste including feces and urine—up to 20 times more than produced by the U.S. population posing serious threats to ground and surface water from excess nutrients and pathogens. (BZA Record, Exh. F at p. 2-5)

  - CAFOs generate a variety of dangerous air pollutants including ammonia, hydrogen sulfide, methane, nitrous oxide, VOCs and particulate matter. These pollutants pose serious health threats to people who live nearby including bronchitis, pulmonary disease, asthma and respiratory distress syndrome, irritation to the eyes, nose and throat, anxiety and depression, memory loss, heart disease and even death. (BZA Record, Exh. F at p. 5-7)

  - CAFOs produce extremely noxious odors from a mixture of odorous compounds that smell much worse than odors associated with traditional farms. And unlike traditional farm smells, the extreme odors from CAFOs greatly diminish quality of life, reduce property values and alter the daily activities for neighbors. (BZA Record, Exh. F at p. 7-8)

- The federal CAFO rule at 40 CFR 122.23 (BZA Record, Exh. G) including the federal definition of a CAFO adopted in Indiana under Ind. Code § 13-11-2-38.3 and state definition of a CFO at Ind. Code § 13-11-2-40 neither of which recognize CAFOs as "farms" but rather as "facilities" and "operations" with "production" and "animal confinement" areas, and "waste containment" areas, structures and systems. (BZA Record, Exh. G; Exh. 1 at p. 9) and demonstrating that due to their industrial-scale and impact, CAFOs are subject to federal and state regulations that traditional farms are not.

On June 7, 2018, the Zoning Administrator, Steve Minnick, submitted a report to the BZA detailing the basis for his approval of the building permit. (BZA Record, Exh. L) In relevant part, Mr. Minnick explained:

> The property where the proposed buildings are to be located is zoned (F) Farming under the Delaware County Comprehensive Zoning Ordinance. Since the property is larger than 5 acres it may be used for the business of farming. *The raising of hogs is an allowed use in a (F) Farming Zone.* The ordinance requires animal uses to be at least 200 feet from a dwelling (other than a farm dwelling), school, church, hospital or institution for human care. The site drawing met that requirement as well as the minimum building setback requirements for a front yard of 50 feet, side yards of 25 feet and a rear yard of 50 feet. The proposed buildings did not exceed the 45 foot height limitation specified *under the ordinance.* I therefore had no cause to not approve the project for zoning compliance *under the ordinance.*
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> (BZA Record, Exh. L) (emphasis added).

For their part, the Petitioners' counsel coordinated with lawyers for the Indiana Pork Producers Association and the Zoning Administrator prior to the BZA hearing to come up with a variety of arguments that they could "throw . . . against the wall to see what sticks." (See email communications of June 21-22, 2018 produced as part of the public record between Steve Minnick and respective counsel for Petitioners and Indiana Pork Producers attached hereto as Exhibit 3). Then Petitioners and the Indiana Pork Producers submitted a Motion to Dismiss or Deny Application for Appeal (attached hereto as Exhibit 4) and supporting memorandum prior to the BZA hearing without providing a copy to Intervenors' counsel. In their motion, Petitioners insisted that the BZA should dismiss the appeal because it "lack[ed] jurisdiction over this dispute" or in the alternative that the BZA should deny the appeal because the building permit was properly issued by the Zoning Administrator. (Exh. 4 at p. 1)

On June 28, 2018, the BZA held a hearing. At the outset, BZA counsel Megan Quirk advised that "the single issue" the BZA was being "asked to consider is whether or not the county building commissioner improperly issued the building permit to Rhett Light."

(Transcript at p. 2). Both Intervenors and the Lights, by counsel, were then allowed to present evidence and argument on that single issue. (Transcript at pp 4-51)

Intervenors' counsel went through the evidence and legal authorities submitted with Intervenors' Application for Appeal and supporting memorandum demonstrating that the building permit was illegally issued because CAFOs are not permitted uses in the "F-Farming Zone." (Transcript at pp. 10-15, 43-48) Intervenors' counsel also discussed the following points:

- the Zoning Ordinance was enacted in 1973, when traditional farms dotted the Indiana landscape, and was last amended in 1993 to add the "F-Farming Zone" set forth in Article XII (Transcript at p. 15; BZA Record, Exh. H);

- Article XII prohibits "any building structure or land use" in the "F-Farm Zone" except those "specifically listed" as "permitted uses"—a list that does not include CAFOs (Transcript at p. 16);

- it is a long-standing rule of statutory construction that the enumeration of certain things in a statute necessarily implies the exclusion of all other things not listed. For example, in *T.W. Thom Construction v. City of Jeffersonville,* 721 N.E.2d 319 (Ind. Ct. App. 1999) the court of appeals held that a zoning ordinance that did not specify mobile home parks as permitted uses in any zoning district were not allowed in the residential district because they were not listed and "mobile home parks are not just another residential use but a distinct category unlike any other" (Transcript at pp. 16-17);

- a CAFO is likewise not just another farming use but a distinct industrial agricultural use that is unlike a traditional farm as evident by: (1) the regulatory definition of "CAFO" which describes an "operation" or "facility," with huge numbers of animals, "production," "animal confinement" and "waste management areas, structures and systems," not present at a farm; and (2) Rhett Light's CAFO permit application to IDEM which is more than 300 pages and seeks regulatory approval that a farm does not have to obtain. (Transcript at pp. 17-18; BZA Record, Exh. I)

- the "F Farm Zone" requires only a minimum lot size of five acres and a 200-foot setback from non-farm dwellings, schools, churches, hospitals and institutions for human care. This county setback violates the required IDEM setback for CAFOs and demonstrates that the 1993 drafters of Article XII could not have contemplated CAFOs because they would not have drafted a zoning ordinance that violates state law. (Transcript at pp. 18-19)

- a March 26, 2018 news article on the CAFO controversy in the Ball State Daily quotes county attorney John Brooks as saying, "Up to this point, the county did not have zoning regulations concerning confined animal feeding operations other than to just simply place in the area zoned for agriculture." (Transcript at p. 19; BZA Record, Exh. J)

- although Delaware County has a few existing CAFOs does not mean that CAFOs are permitted uses in the Farm Zone. Instead, such CAFOs are considered non-conforming agricultural uses under Ind. Code § 36-7-4-616. That statute prohibits a county from using its authority to terminate such uses but does not prevent a county from preventing conforming land uses (e.g., cropland) from becoming non-conforming uses (e.g., a CAFO) as the building permit does here. (Transcript at pp. 20-21)

In turn, Petitioners' counsel presented evidence and argument that the BZA lacked authority to hear the appeal, that the Zoning Administrator did everything correctly in issuing the building permit, and that CAFOs are permitted uses in the F Farm Zone. (Transcript at pp. 30-42, 49-51) Specifically, Petitioners' counsel argued that Intervenors' appeal involved only whether the Zoning Administrator complied with the county building code, not the zoning ordinance, such that the BZA was not the proper forum for appeal. (Transcript at pp. 32-37) Petitioners' counsel asserted that under Indiana law the Light CAFO isn't really a CAFO after all, but a smaller CFO—a claim he later admitted was not true. (Transcript pp. 31, 44, 51-52) Petitioners' counsel then spent time providing his interpretation of Article XII asserting that the "raising and sale of chickens, hogs, cattle, turkey other animals . . . could [all] be CAFOs" and, assuming incorrectly, that Intervenors' counsel would agree that a "dairy" necessarily includes a CAFO. (Transcript at pp. 39-40, 45) And, finally, Petitioners' counsel argued that because there are other confined feeding operations in Delaware County, that means CAFOs are permitted uses in the farming zone. (Transcript at pp. 41-42)

Members of the BZA then asked several substantive questions of both Parties' counsel. (*See, e.g.*, Transcript 48-49, 51-52). At the conclusion of the proceedings, after the BZA was instructed as to what a yes or no vote would mean, the BZA voted 5-2 in favor of granting the appeal and voiding the permit. The BZA issued written findings at its next BZA meeting on July 26, 2018[1] as follows:

> 1. That due notice was given of this hearing and that this Appeal is properly before this Board for action thereon.
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> 2. That this is an Appeal of the Decision, filed pursuant to the Delaware County Comprehensive Zoning Ordinance, Article XXXII, Section 5-B-l, and IC 36-7-4-918.1, to issue Building Permit No. B2018-045 issued on May 17, 2018 to Rhett Light for construction of four buildings to be used for a concentrated animal feeding operation (CAFO) on property owned by Gailon Light located on premises known as 2601 W. CR 1270N, Muncie, Indiana.
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> 3. That the Appeal is seeking revocation of said Building Permit No. B201 8-045.
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> 4. That the building permit was issued due to the County Commissioners' abuse of power.
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> 5. That the F Farming Zone does not recognize industrial agricultural uses, such as the Rhett Light CAFO that will generate as much urine and feces as a small town.
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> 6. That the building permit should not have been issued because it is the product of arbitrary zoning decisions.
>
> 7. That said Appeal should be granted.

(Petitioners' Exh. 6 at pp. 1-2)

Petitioners appealed the BZA's decision on July 26, 2018.

[1] Petitioners' counsel implies that the BZA should have issued its findings immediately at the close of the hearing. But as Petitioners' counsel is well aware, BZAs often do not issue written findings until subsequent meetings. *See*, *e.g.*, *House of Prayer Ministries v. Rush Cty. Bd. Of Zoning Appeals*, 91 N.E.3d 1053, 1057 (2018)(a case involving Petitioners' counsel wherein the Court of Appeals found nothing untoward when the BZA took three months to issue written findings in support of its zoning decision).

IV. The Legal Standard is Deferential to the BZA

When a court reviews a BZA's decision, it presumes that the determination of the BZA, an administrative agency with expertise in zoning matters, is correct. *Job Steel Corp. v. Bd. of Zoning Appeals of Burns Harbor*, 980 N.E.2d 449 (Ind. Ct. App. 2012) (affirming BZA's decision) (citing *Midwest Minerals Inc. v. Bd. of Zoning Appeals of Area Plan Com'n of Vigo County*, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008)). As such, the reviewing court will reverse only if the BZA's decision is arbitrary, capricious, or an abuse of discretion. *Id*. The Court will not reweigh the evidence or substitute its discretion for that of the board. *Id*. "Thus, [a petitioner] labors under a heavy burden in persuading [the] court to overturn the BZA's decision." *Id*. Moreover, a court's review begins with the presumption that the BZA, due to its expertise, reached a correct decision. *Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009). Unless the BZA's decision was illegal, it must be upheld. *McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Com*., 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991).

In reviewing a BZA's interpretation of its zoning ordinance, the Court of Appeals has held:

> [T]he express language of the ordinance controls our interpretation and our goal is to determine, give effect to, and implement the intent of the enacting body. When an ordinance is subject to different interpretations, the interpretation chosen by the administrative agency charged with the duty of enforcing the ordinance is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself. ***If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency. Once a court determines that an administrative agency's interpretation is reasonable, it should end its analysis and not address the reasonableness of the other party's interpretation.*** Terminating the analysis reinforces the policies of acknowledging the expertise of agencies empowered to interpret and enforce ordinances and increasing public reliance on agency interpretations.

Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), trans. denied (emphasis added).

Put another way, once this Court determines that the Delaware County BZA's interpretation of its own Zoning Ordinance is reasonable, the analysis ends. *Id.* That is the situation here.

V. Argument

A. The BZA's interpretation of the Zoning Ordinance is reasonable

The BZA concluded that the "F Farming Zone does not recognize industrial agricultural uses, such as the Rhett Light CAFO that will generate as much urine and feces as a small town." (Petitioners' Exh. 6) That determination was reasonable based on the history, ambiguous language of the Zoning Ordinance and the extensive evidence presented to the BZA.

Specifically, the Delaware County Zoning Ordinance was enacted more than four decades ago in 1973, when traditional farms dotted the Indiana landscape. (BZA Record, Exh. H). The "F-Farming Zone" was subsequently added twenty-six years ago, in 1993 and prohibits any "building structure or land use" except those specifically enumerated "permitted uses" including "field crops, dairies, tree crops, flower gardening, nurseries, orchards, farms for the hatching, raising and sale of chickens, hogs, cattle, turkeys or other animals, horse farm, sheep raising, breed, boarding or sale of dogs, aquariums . . . [and] barns and similar farming buildings." (BZA Record, Exh. H). The only requirements for these permitted uses is that they occur "on a tract of land having a minimum area of five (5) acres" and are "at least 200 feet from a dwelling (other than a farm dwelling), school, church, hospital or institution for human care." *Id.*

Aside from these provisions, Article XII offers no guidance for the size, scale, type, nature or scope of agricultural uses allowed in the Farm Zone. And, Article XII does not identify a CAFO as a permitted use, nor could it, given that the term CAFO was not a legally defined term in Indiana until 1996. See Ind. Code § 13-11-2-40. Thereafter, the Delaware County Commissioners did not incorporate the 1996 definition into Article XII or update the Farm Zone requirements even when they came in conflict with Indiana regulations regarding CAFOs. Indeed, the Farm Zone's 200-foot setback from "non-farm dwellings, schools, churches, hospitals or other institutions for human care" directly conflicts with the IDEM requirements in Title 327 of the Indiana Administrative Code that impose setbacks for CAFOs ranging from 400 to 1,000 feet. See 327 IAC 19-12-3. Based on this history and legal ambiguity, it was entirely reasonable for the BZA to construe Article XII to exclude CAFOs as permitted uses in the Farm Zone. And indeed, it would be entirely unreasonable for the BZA to have assumed that the 1993 drafters of the Farm Zone intended to draft an ordinance that conflicts with state law.

It was also reasonable for the BZA to reach its conclusion that a CAFO is not a permitted use in the Farm Zone based on the evidence before it. That evidence shows that in 1993, livestock were still being raised on traditional farms not in highly mechanized, industrial operations that intensively confine animals. (BZA Record, Exh. E) And, unlike traditional farms in existence at the time, current-day CAFOs generate enormous quantities of biological waste, stored in massive pits and lagoons, that generate dangerous air pollutants, and pose serious health threats to people who live nearby. (BZA Record, Exh. F) CAFOs produce extremely noxious odors that smell much worse than odors associated with traditional farms of yesteryear. And, unlike traditional farm smells, the extreme odors from

CAFOs greatly diminish quality of life, reduce property values, and alter the daily activities for neighbors. (BZA Record, Exhs. A-C, E, F) While the Farm Zone's 200-foot setback makes sense for a traditional farm, the evidence shows that it is entirely unreasonable and dangerous to allow a 10,000+ hog factory with massive waste pits, spewing noxious gases to be located that close to where people live.

The BZA's interpretation is also in line with established rules of statutory construction. As explained by the Indiana Court of Appeals, "when a zoning ordinance permits specified uses in specific zoning districts, all other uses in those districts are forbidden absent a special use permit or variance." *T.W. Thom Constr. v. City of Jeffersonville*, 721 N.E.2d 319, 325 (Ind. Ct. App. 1999); *Area Plan Comm'n of Evansville and Vanderburgh County v. Wilson*, 701 N.E.2d 856, 862 (Ind. Ct. App. 1998); *Day v. Ryan*, 560 N.E.2d 77, 82 (Ind. Ct. App. 1990). This rule is based on "the long-standing principle of statutory construction expressed in the Latin phrase *expressio unius est exclusio alterius*, which means that the enumeration of certain things in a statute necessarily implies the exclusion of all others." *Id.; see also Brandmaier v. Metropolitan Dev. Comm'n of Marion County*, 714 N.E.2d 179, 180 (Ind. Ct. App. 1999).

To illustrate, in *T.W. Thom Constr. v. City of Jeffersonville,* the appeals court held that the city's zoning ordinance which did not "permit[] or specif[y] mobile home parks as a land use in any zoning district" were not allowed in residential districts because "mobile home parks are not just another residential use but a distinct category of use unlike any other." 721 N.E. 2d at 324-25. That is the situation here. CAFOs are not just another farming use but a distinct category of agricultural use that is not listed or specified as a permitted

use in any zoning district in Delaware County. A fact that the County Commissioners acknowledged.[2]

Petitioners insist that the instant matter is similar to the situation in *Flying J v. City of New Haven*, 855 N.E.2d 1035 (Ind. Ct. App. 2006). (Petitioners' Br. at 13) But that case is inapposite. The issue in *Flying J* was whether a travel plaza and fueling station were the same as an "automobile service" or "service station" which were permitted uses under the City ordinance. The BZA argued that the travel plaza fell outside of those definitions because would serve RVs and semitrucks in addition to passenger automobiles and was not a permitted use. *Id.* at 1038. The Court disagreed concluding that service stations service other types of vehicles in addition to four-wheeled passenger vehicles. *Id.* at 1040-41. That is not the situation here where the Farm Zone categorically excludes any mention of a whole category of legally defined and regulated industrial agricultural uses that are clearly distinct based on common sense and common understanding of what it means to be a "farm".

Petitioners argue that the BZA's interpretation of the Zoning Ordinance is unreasonable because a CAFO of the size and scale of the Light CAFO is a "modern agricultural use" and "similar to how pigs have been raised in Indiana and elsewhere for decades." (Petitioners' Br. at p. 21) While that may be true, that does not mean that such "modern" uses are permitted uses in the Farm Zone and the BZA reasonably determined they are not.

[2] Referring to Commissioner King's statement at the March 19, 2018 Commissioners' meeting that "no one brought it to our attention that there are not CAFO regulations in our County" and county attorney John Brooke's explanation that "a CAFO is not considered an agricultural use" under other county ordinances that he reviewed. (Transcript at p. 19)

Petitioners insist that the Farm Zone includes CAFOs as permitted uses because other confinement operations have been established in Delaware County. But that fact says nothing about whether those existing operations are permitted uses under the Farm Zone. Instead, under Ind. Code § 36-7-4-616, those operations meet the definition of a "nonconforming agricultural use" defined as "the agricultural use of land that is *not* permitted under the most recent comprehensive plan or zoning ordinance, including any amendments, for the area where the land is located."

Petitioners go on to devote much of their brief to argue over the common meaning of terms such as "farm" or "barn" as they relate to the Farm Zone. In support, they point to *Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319 (Ind. Ct. App. 2013). But that case does not support Petitioners' arguments. In *Parker,* the court considered the applicability of Indiana's Right to Farm Act ("RTFA") to a nuisance claim for damages against a CAFO brought by a neighbor. This case is not a nuisance suit—it is a judicial review proceeding considering the BZA's ability to interpret its own zoning ordinance. Petitioners also cite to I.C. 32-30-6-1 which defines the term "agricultural operation" under the RTFA. But again, this is not a RTFA case so the definition is irrelevant.

Petitioners point to *House of Prayer Ministries, Inc. v. Rush Cty. Bd. Of Zoning Appeals*, 91 N.E.3d 1053, 1063-64 (Ind. Ct. App. 2018) for the proposition that the courts are prohibited from adding language to an ordinance and any ambiguity should be resolved to avoid an absurd result. While that is true, it is the Petitioners that are urging this Court to add language and meaning into the Farm Ordinance that does not exist. Indeed, it is Petitioners who want to add an entire category and classification of statutorily defined and regulated industrial-scale agricultural uses to an ordinance that predates the category's

statutory existence. Furthermore, the outcome that Petitioners urge, for the Court to overturn the BZA's reasonable interpretation of its own ordinance, is the outcome that would lead to an absurd result and should, therefore, be rejected by this Court.

In sum, Petitioners believe that the Farm Zone includes all possible agricultural uses regardless of their nature, size, type, scale and impact. While Petitioners' view may be a reasonable one, it is no more reasonable than the BZA's interpretation which, is supported by the history of the Zoning Ordinance and the substantial evidence presented to the BZA. Because the BZA is charged with enforcing the Zoning Ordinance, its reasonable interpretation must be given due deference by this Court.

B. The BZA had authority to hear Intervenors' appeal

Ind. Code § 36-7-4-918.1 states in relevant part that "a board of zoning appeals shall hear and determine appeals from and review of "any order, requirement, decision, or determination made by an administrative official, hearing officer, or staff member under the zoning ordinance." (emphasis added). In turn, Zoning Ordinance, Article XXXII, § 5(B)(1) places authority with the BZA to hear "[a]ppeals from the review of an order, requirement, or decision of the Administrative Zoning Officer" which "shall include any interpretation rendered by said officer, which an applicant for a permit may deem questionable, or the refusal of the officer to issue a zoning permit." (emphasis added).

In their effort to throw the kitchen sink to "see what sticks," Petitioners insist that "none of these code sections give the BZA authority to void the Building Commissioner's issuance of a building permit" because "the Building Permit was issued under the Delaware County *Building* Ordinance, not the *Zoning* Ordinance" and, therefore, the BZA lacked authority to hear the appeal. (Petitioners' Br. at p. 21) (emphasis in original). In support,

Petitioners devote several pages of their brief detailing the required procedure for appealing "decisions of the County Department of Buildings" under Ind. Code § 36-7-8-9 and Building Ordinance § 4-1-16 and Intervenors' purported failure to comply with these provisions. (Petitioners' Br. at 22) Petitioners' litany of arguments related to these irrelevant provisions are baseless distractions.

Simply put, Intervenors' appeal did not ask the BZA to determine whether the building permit issued by Steve Minnick complied with the Building Code. Rather, the central issue raised by Intervenors was whether the building permit was improperly issued because CAFOs are not permitted uses *under the Zoning Ordinance*. Indeed, Steve Minnick's report to the BZA confirms that he reviewed the CAFO project for "*zoning compliance under the ordinance*" and concluded that "the raising of hogs is an allowed use in a (F) Farm Zone." (BZA Record, Exh. L) (emphasis added). It is that wrongful interpretation of the Zoning Ordinance that was squarely before the BZA. Thus, the BZA had clear and inherent authority under Indiana Code § 36-7-4-918.1 to review that interpretation and revoke the building permit wrongfully issued as a result.

C. Petitioners' due process rights are intact

Petitioners irresponsibly accuse Megan Quirk of "taint[ing] the entire BZA appeal and violat[ing] [their] due process rights." (Petitioners' Br. at 25). Petitioners have zero evidence to support their claim and concoct a vast conspiracy where none exists. The facts are these:

News of the Light CAFO sparked substantial public controversy in the local community. According to public records, IDEM received numerous public comments from

area residents concerned about the CAFO,[3] including a letter dated January 8, 2018 from John and Jack Quirk who own land nearby expressing their concerns about surface and groundwater contamination due to the CAFO. (Petitioners' Exh. 7) John and Jack Quirk are law partners and related to BZA counsel, Megan Quirk. There is no evidence that Ms. Quirk knew about this letter.

Contrary to Petitioners' version of events, at some point on or before January 5th, John Quirk called Intervenors' counsel seeking guidance on IDEM's CAFO permitting and review process. (Petitioners' Exh. 8 at pp. 2-3). Intervenors' counsel is a public interest environmental lawyer who works for a non-profit organization and receives hundreds of such calls from concerned citizens about CAFOs. *(Id.)* Intervenors' counsel does not recall the specifics of the conversation, and does not have any written or audio recording of the phone call. *(Id.)* Counsel's knowledge that the call even took place is based on an e-mail she sent connecting John Quirk to another concerned citizen, Intervenor Kathy Driscoll, and providing both limited advice on IDEM's regulatory process. (*Id.*). John Quirk did not respond to that email and did not communicate further with Intervenors' counsel or any of the Intervenors. All of this transpired a full five months before this matter came before the BZA. Megan Quirk has not communicated with Intervenors' counsel or Intervenors outside of her role as BZA attorney. *(Id.)*

A BZA must comply with the requirements of due process. *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC*, 785 N.E.2d 238, 246 (Ind. Ct. App. 2003). "Although BZAs are not held to technical legal requirements, they must comply with the constitutional standards of being orderly, impartial, judicious, and fundamentally fair." *Id.* at 246-47

[3] All public comments submitted to IDEM are a matter of public record and available on line through IDEM's Virtual File Cabinet at https://vfc.idem.in.gov/DocumentSearch.aspx.

(citations omitted). Due process requires a neutral and unbiased fact finder in land variance proceedings. *Id.* at 253. However, without demonstration of actual bias, courts will not interfere with an administrative decision. *Ripley County Bd. Of Zoning Appeals v. Rumpke of Indiana, Inc.* 663 N.E.2d 198, 209 (1996).

Indiana law also imposes the following statutory prohibition on communications with BZA members:

> A person may not communicate with any member of the board before the hearing with intent to influence the member's action on a matter pending before the board. Not less than five (5) days before the hearing, however, the staff (as defined in the zoning ordinance), if any, may file with the board a written statement setting forth any facts or opinions relating to the matter.

Ind. Code § 36-7-4-920(g). And, under professional ethics rules, an attorney cannot participate in a matter as a government employee in which the lawyer "participated personally and substantially" while in private practice or while not working for the government. In. Rule of Prof Conduct. 1.11(d)(2).

Megan Quirk complied with each of these due process, statutory and professional ethics standards and did nothing to impugn the impartiality of the BZA appeal. She did her job. Petitioners' alleged due process violations rely on wild innuendo that Intervenors' counsel and the Quirk family/firm all conspired with Ms. Quirk to influence the BZA. However, there is simply not a shred of evidence to support this and Petitioners' unfounded suspicions and offensive, baseless accusations do not give rise to a due process claim.

Indeed, in *House of Prayer Ministries*, where a county commissioner *actually* attempted *ex parte* communications with a member of the BZA in an attempt influence the BZA member's vote, the court nevertheless rejected the petitioners' due process claim

based on testimony that the BZA member did not hear what the county commissioner said. on a zoning matter. 91 N.E.3d at 1062. The court held that an attempted *ex parte* communication that fails to *actually* influence a BZA member's vote is not a due process violation. *Id.*

Here, every single member of the BZA responded to interrogatories that they had no *ex parte* communication with Megan Quirk, Intervenors, or Intervenors' counsel whatsoever outside of the BZA appeal hearing. (*See* Delaware-Muncie Metropolitan Board Of Zoning Appeals' Responses To Petitioners' First Discovery Requests, attached as Exhibit 5). Nevertheless, Petitioners add to their kitchen sink of meritless arguments, that "Ms. Quirk's legal advice to the BZA violates Indiana Code § 36-7-4-909 because she provided legal advice that Petitioners disagree with. (Petitioners' Br. at 27) This argument is simply nonsensical.

Indiana Code § 36-7-4-909 prohibits "a member of a board of zoning appeals" from participating in a hearing or a decision if that member is biased, prejudiced, or unable to be impartial. Ms. Quirk is not a member of the BZA. She does not vote. Thus, Ind. § 36-7-4-909 is not applicable to her. Even if the section were applicable, Petitioners have not shown that Megan Quirk was in any way biased, prejudiced, or unable to be impartial. In fact, the only basis Petitioners provide for Ms. Quirk's alleged bias is that she advised the BZA that they had authority to hear Intervenors' appeal. While Petitioners may disagree with Ms. Quirk's legal opinion, that does not amount to a conflict of interest much less a due process violation.

Even if there was evidence that Megan Quirk had a conflict of interest—which there isn't—the Lights have waived their right to raise it because they did not seek her recusal

prior to or at the BZA hearing. In *Ripley County Bd. of Zoning Appeals*, the court determined that a member of the BZA was biased based on evidence that he had former dealings with the zoning applicant and had made several comments he would run the applicant out of the county if he could. 663 N.E.2d at 209-210. Nevertheless, the court determined that the applicant had waived his right to raise a due process violation because the applicant knew of the BZA member's bias but did not ask that the BZA member step down from the proceedings. *Id*.

Here, Petitioners should have been aware of the letter John and Jack Quirk sent to IDEM which is a public record available on IDEM's online Virtual File Cabinet. The letter was available to Petitioners for five months before Intervenors filed their appeal with the BZA. And the letter is part of the public record that IDEM maintains on Petitioners' CAFO permit application. In short, Petitioners had constructive notice of the letter and ample opportunity to object to Ms. Quirk's participation in the BZA hearing. Their failure to do so waives their right to complain about it now.

III. CONCLUSION

Petitioners have failed to overcome the substantial legal standard affording deference to the Delaware County BZA's interpretation of its own Zoning Ordinance. They have also failed to provided any evidence or argument to warrant this Court's reversal. The BZA has statutory authority to determine appeals of Zoning Administrator decisions, including issuance of building permits, that involve interpretation of the Zoning Ordinance. The BZA conducted a full hearing on the matter and its decision is based on a reasonable interpretation of the Zoning Ordinance and substantial evidence in the record. Finally, there is no evidence to show that the BZA was improperly influenced or that any member

of the BZA acted impartially. Accordingly, Petitioners arguments fail and the Court should deny their Petition for Judicial Review and affirm the findings of the BZA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2019, a copy of the foregoing document was served upon all counsel of record, by the Indiana E-filing System, as follows:

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