IN THE
INDIANA COURT OF APPEALS

Case No. 21A01-1707-MI-01693

HOUSE OF PRAYER MINISTRIES, INC., d/b/a HARVEST CHRISTIAN CAMP,	)	
	)	Appeal from Fayette Circuit Court
Appellant-Petitioner,	)	
vs.	)	Cause No: 21C01-1610-MI-607
RUSH COUNTY AREA BOARD OF ZONING APPEALS,	)	The Honorable Hubert Branstetter, Judge
Appellee-Respondent.	)	

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS **2**
TABLE OF AUTHORITIES **3**
I. STATEMENT OF ISSUES **5**
II. STATEMENT OF THE CASE **6**
III. STATEMENT OF FACTS **7**
A. Facts and Proceedings Before the BZA *7*
B. BZA Findings *15*
C. The Trial Court's Order *16*
IV. SUMMARY OF ARGUMENT **17**
V. ARGUMENT **18**
A. Standard of Review *18*
B. Requirements for a Special Exception *19*
C. The BZA Did Not Properly Evaluate the Special Exception's Impact on the "Public Interest" *21*
D. The BZA Did Not Address Impacts on Surrounding Properties *24*
E. The Ordinance Required the BZA to Impose a One-Mile Setback Between the CAFO and Harvest Christian Camp *26*
1. The BZA's reading of the setback provision ignores the Ordinance's plain language 26
2. Under the BZA's application, the setback provision violates House of Prayer's right to equal privileges and immunities under Art. I, Section 23 of the Indiana Constitution 29
3. The BZA's application of the setback provision to exclude Harvest Christian Camp violates RLUIPA because it implements a land use regulation on less than equal terms with nonreligious institutions 32
F. The Improper Ex Parte Communications of Commissioner Bacon with the BZA Violated Ind. Code § 36-7-4-920(g) and the Due Process Clause *34*
1. The trial court erred in applying the Metro Board test 35
G. The BZA Decision Violated House of Prayer's Protected Religious Rights *37*
1. The Special Exception burdens House of Prayer's religious mission 38
2. The BZA decision violates RLUIPA by substantially burdening House of Prayer's religious practice without a compelling government interest 40
(a) RLUIPA applies because the Special Exception is a land use regulation 41
(b) The Special Exception substantially burdens Harvest Christian Camp's religious exercise 45
(c) The Special Exception does not further a compelling government interest by the least restrictive means 46
3. The Special Exception violates Ind. Code § 34-13-9-8 (RFRA) because it does not further a compelling government interest by the least restrictive means 47
4. The Special Exception materially burdens the free exercise of religion, a core value of the Indiana Constitution 48
CONCLUSION **50**
APPEALED ORDER **51**
WORD COUNT CERTIFICATE **51**
CERTIFICATE OF SERVICE **51**

TABLE OF AUTHORITIES

CASES

600 Land, Inc. v. Metro. Bd. of Zoning Appeals, 889 N.E.2d 305 (Ind. 2008) ---------------------27
Affordable Recovery Hous. v. City of Blue Island, No. 12-CV-4241, 2016 U.S. Dist. LEXIS 128637 (N.D. Ill. Mar. 23, 2016) --48
Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548 (4th Cir. 2013) -40
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ---46
C.H. v. A.R., 72 N.E.3d 996 (Ind. Ct. App. 2017) ---42
Carlton v. Bd. of Zoning Appeals of City of Indianapolis, 252 Ind. 56, 245 N.E.2d 337 (1969) -18
Cheek v. State, 79 N.E.3d 388 (Ind. Ct. App. 2017) ---27
City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment, 744 N.E.2d 443 (Ind. 2001) --- 48, 49
City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238 (Ind. Ct. App. 2003) ---34, 36, 37
City of New Haven v. Flying J., Inc., 912 N.E.2d 420 (Ind. Ct. App. 2009), trans. denied--------19
Collins v. Day, 644 N.E.2d 72 (Ind. 1994) --- 30, 32
Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro, 734 F.3d 673 (7th Cir. 2013)-------34
Flat Rock Wind, LLC v. Rush Cty. Area Bd. of Zoning Appeals, 70 N.E.3d 848 (Ind. Ct. App. 2017), trans. denied -- 18-24, 28, 29, 38, 39, 46
Fortress Bible Church v. Feiner, 694 F.3d 208 (2d Cir. 2012)---------------------------------------44
Harris v. LIHTC, No. 79A02-1703-SC-638, 2017 Ind. App. LEXIS 493 (Oct. 13, 2017) --------34
Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157 (Ind. Ct. App. 2006), trans. denied--18
In re Name Change of A.L., 81 N.E.3d 283 (Ind. Ct. App. 2017)------------------------------------27
Ind. Dep't of Child Servs. v. J.D., 77 N.E.3d 801 (Ind. Ct. App. 2017), trans. denied -------------27
Infinity Products, Inc. v. Quandt, 810 N.E.2d 1028 (Ind. 2004) --------------------------------------19
Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 U.S. Dist. LEXIS 28 (E.D. Mich. Jan. 3, 2007) --46
Metro. Bd. of Zoning Appeals v. Standard Life Ins. Co., 145 Ind. App. 363, 251 N.E.2d 60 (1969), trans. denied --36
Mizen v. State ex rel. Zoeller, 72 N.E.3d 458 (Ind. Ct. App. 2017), trans. denied------------------27
Monarch Beverage Co. v. Cook, 48 N.E.3d 325 (Ind. Ct. App. 2015), trans. denied --------------29
N. Cheyenne Tribe v. Jackson, 433 F.3d 1083 (8th Cir. 2006) --43
N. Cheyenne Tribe v. Martinez (D.S.D. Apr. 10, 2003), Case No. 5:03-cv-05019 -----------------43
Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269 (Ind. 2014)--------------------------30
Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002) ---42
Price v. State, 622 N.E.2d 954 (Ind. 1993) ---48
River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 611 F.3d 367 (7th Cir. 2010)------33
Riverside Meadows I, LLC v. City of Jeffersonville, 72 N.E.3d 534 (Ind. Ct. App. 2017)18, 20, 25
Rynerson v. City of Franklin, 669 N.E.2d 964 (Ind.1996) --35
Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005)---38, 40, 45
Stytle v. Angola Die Casting Co., 783 N.E.2d 316 (Ind. Ct. App. 2003), trans. denied------------19
Taylor v. City of Gary, 233 F. App'x 561 (7th Cir. 2007)---42

Third Church of Christ v. City of N.Y., 626 F.3d 667, 670 (2d Cir. 2010) ---------- 33
Town of Fortville v. Certain Fortville Annexation Terr. Landowners, 51 N.E.3d 1195 (Ind. 2016) ---------- 19, 35
Tyms-Bey v. State, 69 N.E.3d 488 (Ind. Ct. App. 2017), trans. denied ---------- 47
Vision Church v. Vill. of Long Grove, 468 F.3d 975 (7th Cir. 2006) ---------- 42
World Outreach Conference Ctr. v. City of Chi., 591 F.3d 531 (7th Cir. 2009) ---------- 45

STATUTES

42 U.S.C. § 2000cc *et seq* ---------- 6, 17
42 U.S.C. § 2000cc(a) ---------- 40, 46
42 U.S.C. § 2000cc(b)(1) ---------- 26, 32
42 U.S.C. § 2000cc-3(g) ---------- 42
Ind. Code § 34-13-9-8 ---------- 6, 17, 47
Ind. Code § 36-7-4-601(c)(3) ---------- 24
Ind. Code § 36-7-4-918.2 ---------- 19, 26
Ind. Code § 36-7-4-920(g) ---------- 34, 35, 37
Ind. Code § 36-7-4-1605 ---------- 15

OTHER AUTHORITIES

146 Cong. Rec. S7774-5 ---------- 44
Black's Law Dictionary (8th ed. 2004) ---------- 28
Brief of Appellee Rush County BZA, *Flat Rock Wind LLC v. Rush County Area Board of Zoning Appeals*, Case No. 70A01-1606-PL-1382 (Oct. 17, 2016) ---------- 23
Brief of Intervening Respondent Appellees Daniel & Melissa Sprinkle, *Flat Rock Wind LLC v. Rush County Area Board of Zoning Appeals* (Oct. 17, 2016) ---------- 23
http://harvestchristiancamp.org/about/ ---------- 7
https://www.merriam-webster.com/dictionary/school ---------- 27
James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism?*, 50 S.D. L. Rev. 244 (2005) ---------- 43
Rush County Zoning Ordinance Section 7.10.2(e) ---------- 8, 24, 27, 32
Rush County Zoning Ordinance Section 10.2 ---------- 19, 21, 24, 26
Rush County Zoning Ordinance Section 10.2(d) ---------- 12, 20
Rush County Zoning Ordinance Section 10.2(e) ---------- 12, 20

TREATISES

68 Am. Jur. 2d Schools 1 (1993) ---------- 28
Daniel P. Dalton, *Litigating Religious Land Use Cases* (2nd ed. 2016) ---------- 41

REGULATIONS

410 Ind. Admin. Code 6-7.2, et. seq ---------- 8, 9
410 Ind. Admin. Code 6-7.2-14 ---------- 8

CONSTITUTIONAL PROVISIONS

Ind. Const. art. I, § 23 ---------- 26, 29, 30, 32, 33
Ind. Const. art. I, §§ 2, 3 ---------- 48
U.S. Const. amend. XIV, § 2 ---------- 34, 37

IN THE
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HOUSE OF PRAYER MINISTRIES, INC., d/b/a/ HARVEST CHRISTIAN CAMP, Appellant-Petitioner,	)	Appeal from Fayette Circuit Court
vs.	)	Cause No: 21C01-1610-MI-607
RUSH COUNTY AREA BOARD OF ZONING APPEALS, Appellee-Respondent.	)	The Honorable Hubert Branstetter, Judge

APPELLANT'S BRIEF

I. STATEMENT OF ISSUES

1. Did the trial court err in upholding the Rush County BZA's grant of a special exception to Milco Dairy, Inc. ("Milco") to operate a 1400-head dairy operation a half-mile upwind of Harvest Christian Camp when the BZA did not make specific findings, its ultimate determinations are not supported by substantial evidence, and the decision is contrary to the purpose and intent of the Rush County Zoning Ordinance?

2. Did the trial court err in holding that the BZA decision did not violate House of Prayer's right to an impartial tribunal, despite undisputed evidence of improper influence by a high-ranking county official?

3. Did the trial court err in holding that the BZA decision did not violate House of Prayer's protected religious rights under the Indiana constitution, federal Religious Land Use and

Institutionalized Persons Act ("RLUIPA," 42 U.S.C. § 2000cc *et seq.*), and Indiana Religious Freedom Restoration Act ("RFRA," Ind. Code § 34-13-9-8)?

II. STATEMENT OF THE CASE

Petitioner House of Prayer Ministries, Inc. ("House of Prayer"), by counsel, appeals the Fayette Circuit Court's decision upholding the Rush County Board of Zoning Appeals ("BZA") grant of a special exception ("the Special Exception") to Milco Dairy Farm, LLC ("Milco"). The Special Exception allows Milco to construct and operate a concentrated animal feeding operation ("CAFO") with 1,400 dairy cows and three massive outdoor waste lagoons at 2625 E. 1200 N., Lewisville, Indiana, (App. V:105-114) a half mile upwind of House of Prayer's church ministry and youth camp, known as Harvest Christian Camp.

The BZA held two public hearings on Milco's petition for the Special Exception, on March 16, 2016 (App. IV:88-207), and April 13, 2016 (App. IV:208-V:104) At both hearings, House of Prayer appeared as a remonstrator. At the second hearing, the BZA approved the Special Exception. (App. V:45-46)

House of Prayer subsequently filed its initial petition for judicial review and declaratory judgment with the Rush Circuit Court (Case No. 70C01-1605-MI-162), and transmitted a certified copy of the BZA record to the court, including the BZA's written findings finalized on July 13, 2016. (App. V:109) After conducting discovery, House of Prayer filed an amended petition on September 14, 2016. (App. VI:35-52) Following a transfer of venue, the instant case commenced before the Fayette Circuit Court on October 3, 2016. (App. II:2)

House of Prayer filed a brief in support of its petition on February 28, 2017. (App. VI:62-94) Intervenor Milco responded on March 29, 2017, (App. VI:145-VII:56) as did the BZA. (App.

VII:65-78) House of Prayer replied on April 19, 2017. (VII:79-108) A hearing was held on June 1, 2017. (Tr.) On July 11, 2017, the trial court denied House of Prayer's petition. (App. II:7-24)

This appeal ensued. House of Prayer filed a Notice of Appeal on July 31, 2017. The Clerk's Record and Transcript were submitted to the Court on August 18, 2017. House of Prayer now files this Appellant's Brief pursuant to an extension of time through October 18, 2017, which this Court granted on September 7, 2017.

III. STATEMENT OF FACTS

A. Facts and Proceedings Before the BZA

The following evidence was presented to the BZA at the March and April 2016 hearings:

- House of Prayer is a nonprofit religious organization that operates the church ministry and youth camp known as Harvest Christian Camp on its 36-acre property at 9630 S. 25 W., in Lewisville, Henry County, Indiana. House of Prayer established Harvest Christian Camp in 1984 to minister to children, teens and families. (App. IV:129-130, 138-139)[1]
- Six families reside on the Camp property in six separate residential homes. (App. III:40; IV:132, 141-142)
- The Special Exception will enable Milco to construct and operate a CAFO within a half-mile upwind of Harvest Christian Camp. (App. III:41, 97-98)
- The CAFO will include, among other things, a free stall barn to house 1,400 cows along with three earthen, outdoor waste lagoons for the collection of approximately 20 million gallons of feces, urine, silage leachate, contaminated storm water, and process wastewater.

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[1] *See also* Harvest Christian Camp's website at http://harvestchristiancamp.org/about/ ("Harvest Christian Camp was established in 1984 and is an outreach of the House of Prayer Ministries. HCC networks together with other churches to minister to children, teens, and families").

(App. II:91-93, III:18-19) The collected waste will be emptied from the lagoons and spread on various land parcels that surround the CAFO and Harvest Christian Camp. (App. IV:100, 115-116, 120-122)

- Shankatank Creek, which runs through the Harvest Christian Camp property, receives storm water drainage from a field where the waste generated at the CAFO will be spread. (App. III:95-96, IV:150-151, V:11)
- The Milco property is located in an "A-3" zoning district and is, therefore, subject to "[a]ll underlying zoning district requirements . . . set forth in §7.10, *et. seq*." of the Ordinance. (App. V:107)
- Section 7.10.2(e) of the Ordinance mandates that a "separation distance from an existing CFO/CAFO structure or school shall be a minimum of one (1) mile which shall be measured from the nearest CFO/CAFO structure to the school." (App. V:220)
- The Ordinance does not define "school." Merriam-Webster defines a school as "an organization that provides instruction [such as] an institution for the teaching of children." (App. IV:2, 137-139; V:3-6)
- The Indiana State Department of Health ("ISDH") regulates Harvest Christian Camp as a "Youth Camp" pursuant to 410 Ind. Admin. Code 6-7.2, *et. seq.* A "Youth Camp" is defined by the Indiana State Department of Health at 410 I.A.C. 6-7.2-14 as "any area or tract of land established, operated, or maintained to provide more than seventy-two (72) continuous hours of outdoor group living experiences away from established residences for educational, recreational, sectarian, or health purposes to ten (10) or more children who

are under eighteen (18) years of age and not accompanied by a parent or guardian." (App. IV:2, 137-138; V:4-5)[2]

- The Camp can host 128 children overnight, and up to 768 children over the course of the summer. (App. III:93-94; IV:2, 138-139; V:5-6) Its facilities include 13 open-air cabins, collectively with 106 beds, three classrooms/dorms and two multi-purpose buildings with offices, a sanctuary, kitchen and shop. (App. III:93-94; IV:138-139; V:5)
- The Camp offers a day camp program for young children 4-7 years of age and several multi-day and week-long overnight programs for children and teens over 8 years old. Those programs engage children in numerous outdoor and educational activities such as archery, swimming, games, sports, go-carts, a giant slip and slide, paint ball, campfires, night services, bible classes and workshops in music, drama, dance, arts and crafts, sign language, cooking and photography. (App. IV:138-139, 143; V:5-6)
- On average, 500 children of ages 4 to 17 attend the Camp during the summer, along with 14 senior staff members, 50-80 regular volunteers, and a variety of speakers, bands, and teachers depending on the activities and time of day. (App. III:93-94, IV:137-139, 242)
- There are regular religious services at the Camp throughout the year at its sanctuary and outdoor chapel, including weekly, evening and Sunday services and bible classes that are

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[2] In addition to its legal duty to protect the health and safety of children entrusted to its care, House of Prayer must comply with numerous specific regulatory requirements to ensure children's health and safety including provision of adult supervision, trained first-aid and emergency personnel, clean water, cooking and eating facilities, safe buildings, classrooms and sleeping shelters. *See* 410 I.A.C. 6-7.2-15 through 32.

open to the public, and several community-wide events and camp programs in the winter and spring. (App. IV:142)

- Thousands of parents, including many from out of state, have sent their children to Harvest Christian Camp over the years because it offers a safe and healthy rural setting for their children to be educated, to grow in faith and enrich their relationship with God, and to be enhanced by the outdoors. (App. IV:138, V:5)
- Dr. Indra Frank, a physician who earned her M.D. from John Hopkins University and a Master's in Public Health from Indiana University's Fairbanks School of Public Health, where she teaches environmental health and environmental toxicology (App. IV:140, 144, V:8), provided evidence and expert testimony at the March 16th hearing as follows:[3]

1) The CAFO's 1,400 dairy cows will produce approximately 19,178 gallons of feces and urine per day which is as much bodily waste as produced by 46,776 people—seven times the amount of urine and feces produced every day by the entire human population of Rushville, although Rushville is not allowed to store human waste in unlined, open-air lagoons where people live and children play. (App. III:95, IV:145, V:9)

2) The prevailing winds in the area come from the southwest, which puts Harvest Christian Camp directly downwind of the proposed CAFO and its manure lagoons. (App. III:96-97, IV:150)

3) Children, staff and volunteers at the Camp are outdoors most of the day and sleep in open-air cabins and will, therefore, be heavily exposed to the CAFO's air pollutants which include endotoxin, hydrogen sulfide, ammonia, particulate matter and volatile organic compounds—pollutants which are well known to pose serious health threats, especially to children, the elderly and those with respiratory illness or weakened immune systems. (App. III:95-96, IV:145-149)

4) In Indiana, 13% of children have had a diagnosis of asthma, so there is a high likelihood that there will be children with asthma attending Harvest Christian Camp. All the pollutants the CAFO will emit are known to aggravate asthma symptoms—a particular

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[3]Although Dr. Frank was unable to attend the April 13th hearing, her report and findings were again presented to the BZA by House of Prayer's counsel. (App. V:8-12)

concern because an asthma attack can restrict a child's breathing enough to be life threatening and send the child to the hospital. (App. III:96, IV:149-150)

5) The massive amount of feces and urine that will be generated by the CAFO could also expose children at Harvest Christian Camp to disease causing bacteria and other microscopic organisms known to be present in cow manure such as *Listeria, E.coli, Salmonella, Cryptosporidium,* and *Giardia* which can run off with manure into Shankatank Creek after manure spreading on nearby fields, exposing children to infectious diseases if they have contact with the creek. (App. III:96, IV:150-151)

- All of Dr. Frank's findings and opinions are supported by peer-reviewed scientific studies, which are cited in her report submitted to the BZA. (App. III:98-99) Dr. Frank's findings and opinions are also supported by a report prepared by the National Association of Local Boards of Health in partnership with the Centers for Disease Control to help local health departments understand the public health, environmental and community impacts of CAFOs. (App. III:100-128)

- A Purdue University Extension report reviewing the "academic studies on CAFO impacts on house prices" was discussed and submitted to the BZA. (App. III:132-133, V:12) The Purdue report concludes that "[m]arket prices for homes are expected to decline the closer the home is to the CAFO," a "downwind home will realize a significantly larger decline in value relative to a home upwind that is the same distance from the CAFO" and "property value impacts diminish to negligible effects beyond a distance of two miles." Due to these "potential inequities," Purdue concludes "that communities and operators must choose to site CAFOs in a manner that either minimizes differential impacts on home values or compensates those individuals disproportionately impacted." (App. III:132-133)

- A report by John A. Kilpatrick, Ph.D., MRICS, an Indiana Certified Real Estate Appraiser and nationally certified instructor of the Uniform Standards of Professional Appraisal Practice was also discussed and submitted to the BZA. (App. III:134-145, V:12-14) In his

report, Dr. Kilpatrick reviews numerous empirical and case studies conducted over several decades[4] demonstrating that, "diminished marketability, loss of use and enjoyment, and loss of exclusivity results in a diminishment which can range from 50% to nearly 90% of otherwise unimpaired value for homes which are adjacent to [a CAFO] with negative impacts noted at distances exceeding 3 miles." (App. III:144)

Based on the above facts, Harvest Christian Camp argued that the Special Exception would adversely affect the public interest, would have adverse effects on the surrounding properties in violation of Section 10.2(d) and (e) of the Rush County Ordinance, and would prevent Harvest Christian Camp from carrying out its religious mission and purpose. (App. IV:130-131, 244-245; V:7)

Milco's counsel stated to the BZA, without evidence, that the CAFO would involve a five-million-dollar investment with 15 local residents on payroll, and would boost property tax revenues by "fifty thousand dollars a year." (App. IV:223-224) The claims were echoed by the son of Milco's owner, but again without evidence. (App. IV:226)

At the close of the public hearing on April 13, 2016 but before the vote was taken, the BZA took a 19-minute break from 8:23 to 8:42 p.m. (App. IV:208) Before the break, BZA counsel Grant Reeves cautioned the BZA members not to discuss the matter with anyone off the record and instructed the audience not to speak with BZA members. (App. V:30-31)

During the break, Pastor David Todd of House of Prayer saw County Commissioner Mark Bacon speak with three BZA members during the recess—one for about five (5) minutes inside

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[4] A "Summary of Literature on Property Value Impacts of CAFOs" was also provided to the BZA. (App. III:129-131)

the assembly room, and two others for approximately eight (8) minutes outside in the hallway—an observation that was alarming to Pastor Todd in light of BZA Attorney Grant Reeves' instruction to the audience. (App. VI:130-131) Adding to Pastor Todd's concern were the facts that Bacon is with the Farm Bureau and could have spoken to any of the other hundred or so people in attendance that night, but chose to speak with BZA members instead, and therefore appeared to be trying to influence the vote. (App. VI:131) Pastor Todd called Reeves the next day and left a message about his concerns over what he saw. (App. VI:132)

Pastor Todd's observation was corroborated by deposition testimony of three BZA members and Bacon himself. Specifically, BZA member Dohn Greene testified that he "heard in passing" that Bacon had spoken to someone in a hallway and heard from Grant Reeves that "the Bacon fella tried to influence the CAFO for Milco." (App. VI:96) BZA member Phil Shanahan, confirmed that he, Trent and Bacon are on the Rush County Area Plan Commission together and that he has known Bacon for years explaining, "Yeah, I know him, yep. He's on the Commission. Like I said, he's a County Councilman, he's on the APC Board; we all vote together on what is either pros or cons, on everything." (App. VI:107-108)

Phil Shanahan further testified that at the conclusion of the hearing that evening, three or four of his friends told him that they saw Bacon talking to BZA member Craig Trent during the recess (App. VI:110-111) and expressed concern about what they saw. (App. VI:112) In Mr. Shanahan's view, Bacon and Trent discussing the Milco issue during the break and before the vote is a problem (App. VI:112), and would be improper because Reeves advised the audience not to talk to BZA members. (App. VI:113)

Trent confirmed that Bacon approached him in the hallway during the break. (App. VI:118) Trent further testified that he heard that Bacon spoke with other BZA members to influence the vote and that there was an executive session held to discuss it. (App. VI:119-120)

Bacon has been on the Board of Directors of the Indiana Farm Bureau for eleven years (App. VI:140), and has been a Rush County Commissioner since 2012. (App. VI:137) The Indiana Farm Bureau advocates for farmers before local government bodies. (App. VI:141) In fact, Bacon learned what his duties would be as a County Commissioner from being on the Farm Bureau Board, and he became a County Commissioner because of his position with the Indiana Farm Bureau. (App. VI:137-138) As a result of this role, Bacon learned of Milco's plans to build the CAFO before Milco had even submitted its application for a Special Exception to the County. (App. VI:139)

Bacon testified that as a County Commissioner and Plan Commission member, he is familiar with the Ordinance and the processes and laws that apply to his official positions including the conflict of interest rules. He also knew that the BZA is a quasi-judicial body, which to his understanding means that the BZA must remain impartial. (App. VI:142) Nevertheless, Bacon admitted that during the break, and before the BZA vote on Milco's application, he spoke with BZA member Craig Trent in the middle of the hallway and "made a comment that there was—according to the Ordinance, there was no reason to not pass [the special exception]." (App. VI:142) Bacon agreed that a BZA member having a private conversation with him before the vote on Milco's Petition could raise suspicions that he was trying to influence the BZA member's vote. (App. VI:142-143)

Upon reconvening after the break, the BZA approved Milco's Special Exception. (App. V:45-46) Harvest Christian Camp timely filed a petition for judicial review and declaratory judgment in accordance with I.C. § 36-7-4-1605.

B. BZA Findings

The BZA certified its written findings on July 13, 2016, three months after approving the Special Exception. (App. V:105-109) The BZA made the following relevant findings:

> The BZA finds that the granting of the Special Exception will not adversely affect the public interest, subject to the additional conditions and restrictions placed on the project by the BZA. The public interest refers to the wellbeing of the Rush County community as a whole. While there may be some incidental nuisances associated with construction of the Diary in the immediate area, as a whole, the citizens of Rush County will benefit from the economic development opportunities this project brings. The evidence at the public hearing demonstrated the Dairy project would provide economic benefits to the public through local property taxes and additional employment opportunities. Any nuisances involved are of the type expected from CAFO/CFO operations, which are clearly allowed/allowable uses under the Rush County Zoning Ordinance in the district where the proposed Dairy is to be located. (App. V:106)
>
> . . .
>
> **Economic impacts on adjoining properties generally in the district:** the BZA determines that, given that the parcel is located in an A-3 district where agricultural development is intended and given the precautions and additional conditions the applicant has taken with regard to buffering and manure management, that the economic impacts should be minimized on the adjoining properties and in the district in general. Any impacts shall be more than off-set by the gains to the community as a whole with regard to increased employment and economic activity. (App. V:107)
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> . . .
>
> **Odor impacts on adjoining properties generally in the district:** The applicant has met the odor abatement procedures set forth in the Rush County Zoning Ordinance and the odor abatement techniques set forth in its application.
>
> Additionally, the BZA imposed the additional condition that all manure be knifed in to the soil. Given these restrictions, the BZA finds that the applicant has met the

> requirements to mitigate odor to the level anticipated and expected in an A-3 district. (App. V:108)
>
> . . .
>
> Given that this parcel is located in an A-3 zoning district, where agricultural development is expected, the BZA finds that this use is compatible with the adjacent properties. (App. V:108)

C. The Trial Court's Order

In its Order of July 11, 2017, the trial court set out the following conclusions relevant to this appeal:

- the BZA findings excerpted above were "sufficient to support intelligent appellate review"; (Trial Court Order at 17)
- the BZA sufficiently considered the public interest because it imposed "conditions related to knifing manure into soil, expanding the truck entrance and turnaround to prevent congestion, planting trees around the dairy in a shelterbelt, submitting manure application agreements to the county, and limiting the number of cattle at the dairy"; (Trial Court Order at 16)
- Harvest Christian Camp was not eligible for the one-mile CAFO setback provided to schools under the Ordinance because many other "businesses . . . could make th[e] claim" that "children are central to [their] business purpose"; (Trial Court Order at 5)
- House of Prayer was not denied due process through Commissioner Bacon's undisputed efforts to influence the BZA through ex parte communication (Trial Court Order at 7) because "Bacon provided no new information" to the BZA member(s), and "there is no employment relationship" between Bacon and the BZA member(s); (Trial Court Order at 8)

and

- House of Prayer did not demonstrate a violation of RLUIPA, RFRA or the Indiana Constitution because it "failed to introduce any evidence of any burden on religion and did not cite to any case law supporting its position." (Trial Court Order at 9)

IV. SUMMARY OF ARGUMENT

The BZA did not have authority to grant Milco a Special Exception allowing a 1400-head dairy CAFO a half mile upwind of Harvest Christian Camp. As House of Prayer showed through extensive expert testimony and documentation, the Special Exception imperils the health of the children attending the Camp, and consequently imperils House of Prayer's ability to continue operating the Camp. The BZA's conclusory findings ignore the evidence before the BZA and cannot support intelligent appellate review. In addressing the public interest, impacts on neighbors, and the applicability of a one-mile setback, the BZA stretches the Ordinance's interpretation to the breaking point. These infirmities arise from deeper problems with the BZA decision, including the improper influence a County Commissioner applied to the BZA in violation of House of Prayer's due process right to an impartial tribunal. The BZA's resulting decision substantially burdens House of Prayer's right to religious exercise so that private individuals can make money—not a compelling government interest. It consequently violates House of Prayer's protected religious rights, most notably under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA," 42 U.S.C. § 2000cc *et seq.*), which was enacted to address this exact problem of local governments impeding religious exercise through discretionary zoning decisions. It additionally violates the Indiana Religious Freedom Restoration Act ("RFRA," I.C. § 34-13-9-8) and the "core value" protection of religious exercise under the Indiana Constitution. For all these reasons, the BZA grant of the Special Exception to Milco is arbitrary and capricious, unsupported by

substantial evidence, contrary to law, and unconstitutional, and therefore the trial court should have set it aside as *ultra vires* and void.

V. ARGUMENT

A. Standard of Review

When reviewing BZA actions, the Court follows the same standard of review as the trial court. *Flat Rock Wind, LLC v. Rush Cty. Area Bd. of Zoning Appeals*, 70 N.E.3d 848, 857 (Ind. Ct. App. 2017), trans. denied. "Under this standard, a reviewing court . . . is limited to determining whether the zoning board's decision was based upon substantial evidence." *Id.* Questions of law are however reviewed *de novo*. *Riverside Meadows I, LLC v. City of Jeffersonville*, 72 N.E.3d 534, 538 (Ind. Ct. App. 2017).

In interpreting an ordinance, "the express language of the ordinance controls . . . 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*." *Flat Rock*, 70 N.E.3d at 857 (emphasis added) (quoting *Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc.*, 844 N.E.2d 157, 163 (Ind. Ct. App. 2006), trans. denied).

BZA findings "must be tailored to address the specific facts presented to the Board, and the Board must enter both specific findings of fact and ultimate findings, or determinations." *Riverside Meadows*, 72 N.E.3d at 540. "The findings must be specific enough to enable the court to review intelligently the [BZA's] decision." *Id.* (quoting *Carlton v. Bd. of Zoning Appeals of City of Indianapolis*, 252 Ind. 56, 64, 245 N.E.2d 337, 343 (1969)). The purpose of the findings is to create "a road map" that allows the reviewing court to "clearly follow the reasoning used by the

Board to reach its ultimate conclusion." *Stytle v. Angola Die Casting Co.,* 783 N.E.2d 316, 321 (Ind. Ct. App. 2003), trans. denied.

"The powers of the BZA are strictly limited to those granted by its authorizing statute." *Flat Rock*, 70 N.E.3d at 858. "Any acts of the BZA that exceed the powers enumerated by the Indiana Code and the local zoning ordinance are *ultra vires* and void." *Id.*

With respect to matters outside the BZA record—here, the ex parte communications between Commissioner Bacon and one or more BZA members—the trial court's findings and conclusions are reviewed for clear error. *City of New Haven v. Flying J., Inc.*, 912 N.E.2d 420, 423 (Ind. Ct. App. 2009), trans. denied. "Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions which rely upon those findings." *Id.*at 423-24 (quoting *Infinity Products, Inc. v. Quandt*, 810 N.E.2d 1028, 1031 (Ind. 2004)). A judgment is also clearly erroneous "if it applies the wrong legal standard to properly found facts." *Town of Fortville v. Certain Fortville Annexation Terr. Landowners*, 51 N.E.3d 1195, 1198 (Ind. 2016).

All of these grounds for reversal apply here.

B. Requirements for a Special Exception

A BZA may grant special exceptions "from the terms of the zoning ordinance, but only in the classes of cases or in the particular situations specified in the zoning ordinance." I.C. § 36-7-4-918.2. The Rush County Ordinance ("the Ordinance") sets out these requirements in Section 10.2, which authorizes the BZA "to grant Special Exceptions with such conditions and safeguards as are appropriate under this ordinance, *or to deny Special Exceptions when not in harmony with*

the purpose and intent of this ordinance." (App. VI:24) (emphasis added). To that end, in *Flat Rock,* this Court recently confirmed that the Ordinance's purpose and intent are as follows:

> Rush County's general intent in instituting zoning ordinances is 'to maintain certain rights of the individual, but to carefully control them in the hope that his development will not have adverse effects on the society around him.' (Zoning Ordinance, Preamble). Overall, the Ordinance's aim is to promote 'the health, safety, or general welfare of Rush County. (Zoning Ordinance, Preamble).
> . . .
>
> When faced with an interpretation of its Zoning Ordinance, the BZA is guided by Section 15, which clarifie[s] that: 'In their interpretation and application, the provisions of this ordinance shall be held to be *minimum requirements*, adopted for the promotion of the public health, safety, or general welfare.'
>
> 70 N.E.3d at 859-860 (see also Ordinance preamble, App.V:118-119).

In line with this purpose, Sections 10.2(d) and (e) of the Ordinance mandate that "[a] Special Exception shall not be granted by the [BZA] unless and until" the BZA makes written findings that: "granting of the Special Exception will not adversely affect the public interest" and "all applicable restrictions of the district in which the Special Exception is to be located have been followed," and "satisfactory provision and arrangement has been made concerning . . . the economic, noise, glare, or odor effects of the Special Exception on adjoining properties generally in the district" and "[g]eneral compatibility with adjacent properties and other property in the district." (App. VI:24-25) As set forth below, the BZA did not enter specific findings on these requirements. But even if such findings could have been retroactively imputed by the trial court,[5] any such implied findings are unsupported by the evidence before the BZA.

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[5] This Court has expressly disapproved implying findings in this way. *Riverside Meadows*, 72 N.E.3d at 540.

C. The BZA Did Not Properly Evaluate the Special Exception's Impact on the "Public Interest"

Section 10.2(d) of the Ordinance requires the BZA in considering a special exception to ensure that it "will not adversely affect the public interest." Here, the BZA found that "any impacts" would be "more than outweighed" by "economic development opportunities" for "the county as a whole," as purportedly demonstrated by "evidence at the public hearing" that "the Dairy project would provide economic benefits to the public through local property taxes and additional employment opportunities." (App. V:106-107) As an initial matter, no such evidence was presented at the hearing.[6] Nor did the BZA enter any findings as to the extent of these "impacts" or the "economic development opportunities" that supposedly outweighed them. More importantly, these findings ignore the BZA's own recent interpretation of what it means to not adversely affect the public interest consistent with the expressly stated purpose and intent of the Ordinance.

Specifically, in *Flat Rock,* this Court recently affirmed the BZA's decision to impose a significantly increased (and project-killing) setback for wind turbines from residences as a condition for a special exception, which the BZA deemed necessary "to promote the public interest" by protecting the "life, health, and safety of the surrounding landowners" consistent with the stated purpose of Section 10.2. *Id.* at 861. In affirming the BZA's decision, this Court explained:

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[6] Milco's counsel made such claims during the BZA hearing. (App. IV:222-223) However, as House of Prayer observed to the trial court (App. VI:79 n.7), an attorney's argument is not evidence, and no evidence other than the self-serving statement of Milco's owner was offered in support of Milco's counsel's assertion. This contrasts with the detailed evidence of economic benefit provided in *Flat Rock*. 70 N.E.3d at 851.

> In interpreting the Zoning Ordinance, the BZA viewed the siting setback as a 'minimum' guideline, which was subject to 'reasonable restrictions' *to preserve the health and safety of the public*. (Zoning Ordinance, Sec. 6.4.2; *see also* Zoning Ordinance 10.2). By evaluating Flat Rock's proposed commercial WECS project as planned and the evidence and testimony received during the hearings, the BZA imposed the Setback Condition to promote the Zoning Ordinance's and the WECS' special exception's stated purpose to promote the public interest.
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> *Id.* at 861 (emphasis added).

Indeed, the Ordinance nowhere indicates that "economic development" can override adverse impacts on neighbors and public health. Rather, Section 10.2 expressly states that a special exception "shall be denied" if "not in harmony with the purpose and intent of this ordinance," focusing on factors such as "the economic, noise, glare, or odor effects . . . on *adjoining properties*" and "general compatibility *with adjacent properties and other property in the district*" (App. V:24-25) (emphasis added).

Interpreting these same provisions, the BZA in *Flat Rock* deemed it was *required* to impose a project-killing setback to protect the public interest even though: (1) the proposed wind development project would provide "an estimated $305 million investment in the county that would create more than 200 construction jobs[,] . . . up to twelve full-time local positions," and "was anticipated to pay an estimated $21.9 million in landowner lease payments and substantial amounts in local property taxes," 70 N.E.3d at 851; and (2) unlike the CAFO Ordinance, the Wind Ordinance was enacted in part to "[f]acilitate economic opportunities for local residents." *Id.* at 860.

In other words, in *Flat Rock* the BZA was presented with a far more lucrative deal than Milco's polluting CAFO and actually had *some* discretion to balance economic benefits against public health impacts. Nevertheless, the BZA still determined it was *required* to impose more than double the setback provided in the wind Ordinance (rather than imposing some lesser non-project-

killing requirement), in order to protect nearby landowners' health and property values because anything less would have been inconsistent with the purpose of the Ordinance. *Id.* at 854 (quoting trial court).[7] This Court and the trial court both agreed with the BZA's determination. *Id.*

Nevertheless, the trial court in this case held that the BZA sufficiently addressed public health and property value impacts through conditions it imposed on Milco, and that these conditions were analogous to the increased setback that killed the wind energy project in *Flat Rock*. (Trial Court Order at 15-16) The record does not support this conclusion. To begin with, the five conditions the BZA imposed (App. V:106) relate primarily to traffic issues (e.g. the provision of a turnaround and expanded truck entrance), and have no bearing at all on House of Prayer's and other remonstrators' specific concerns about health threats to children and reduced property values from the massive amount of excrement that will be generated daily at the CAFO and allowed to putrefy in open air "lagoons" before it is disposed of, untreated on nearby fields. The BZA may have intended to address these concerns by requiring a shelterbelt of trees around the site (initially required to be only two feet high). (App. V:106) But again, the BZA did not explain *what* concerns the shelterbelt would address and why it was sufficient. (App. V:106)

In any event, had the BZA followed its own prior determination that it has no discretion to award special exceptions unless threats to neighbors' health and property are fully addressed, it would have done as House of Prayer requested, and imposed the one-mile setback from CAFOs

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[7] *See also* Brief of Intervening Respondent Appellees Daniel & Melissa Sprinkle ("Landowners"), *Flat Rock Wind LLC v. Rush County Area Board of Zoning Appeals*, Case No. 70A01-1606-PL-1382 (Oct. 17, 2016) at 37 (arguing that "[i]mplicit in the BZA's July 1, 2015 decision is that, *but for* the imposition of the Setback Condition, the . . . Special Exception failed to satisfy the Zoning Ordinance"); Brief of Appellee Rush County BZA (Oct. 17, 2016) at 5 ("the BZA hereby joins in and incorporates by reference the Appellees' Brief filed by the Landowners in this matter, as if fully set forth herein").

under the Section 7.10.2(e) of the Ordinance as a necessary condition to protect the health of children at Harvest Christian Camp. Because even if the Camp is not expressly entitled to protection under Section 7.10.2(e),[8] the Rush County government, in enacting that provision, has determined that one mile is a reasonable and appropriate distance to protect institutions housing large numbers of children from CAFO emissions. Thus, it is a reasonable and comparable condition to the setback the BZA deemed was required to protect neighbors from the (non-waste producing) windmills in *Flat Rock.*

In sum, the BZA abused its discretion, and acted arbitrarily and capriciously, when it evaluated the "public interest" as being served by speculative economic benefits instead of protecting children in the area from a serious public health threat—abandoning the position it recently advocated before this Court, and ignoring public health as a core purpose of the Ordinance and of zoning ordinances generally. *See* I.C. § 36-7-4-601(c)(3) (requiring a county government adopting a zoning ordinance to "act for the purpose[] of . . . [p]romoting the public health"). The BZA entered no findings on the extensive public health evidence before it. Therefore, the trial court's conclusion that the BZA appropriately considered the "public interest" was in error.

D. The BZA Did Not Address Impacts on Surrounding Properties

| In Rush County, an applicant seeking a special exception "bears the burden of satisfying . . . Section 10.2 of the Zoning Ordinance setting forth the general criteria applicable to all applications[.]" *Flat Rock*, 70 N.E.3d at 859. In particular, under Ordinance Section 10.2(e)(8), the applicant must show "general compatibility with adjacent properties and other property in the

[8] As discussed below, House of Prayer is entitled to a one-mile setback under Section 7.10.2(e)'s own terms.

district." On this point, extensive evidence was presented to the BZA that the proposed CAFO will adversely affect both neighbors' health and property values near the proposed CAFO, including Harvest Christian Camp and the homes of the six families who reside on the Camp property. (App. III:95-134) The BZA wholly disregarded this evidence. Instead, it determined that "[a]ny impacts shall be more than off-set by the gains to the community as a whole with regard to increased employment and economic activity" (App. V:107), without pointing to any evidence that could support such a conclusion.

The BZA also stated that "any nuisances involved are of the type expected from CAFO/CFO operations" (App. V:106) and the "parcel is located in an A-3 zoning district, where agricultural development is expected." (App. V:108) Apart from being unsupported by specific findings (the BZA never specifies what these "expected" nuisances might be), the BZA findings on this point answer the wrong question. Under the Ordinance, the general rule is that confined feeding operations having the point score applicable to the Milco CAFO *are not allowed* in an A-3 district. (App. V:222) They are allowed *only* with a Special Exception, which is available *only* when the applicant meets its burden of showing that the proposed use will be consistent with special exception requirements, which include conformity with the purpose of the Ordinance as a whole. (App. VI:24) Thus, a finding that a proposed CAFO will produce "nuisances . . . of the type expected from CAFO/CFO operations" is at least as much of a reason to reject a special exception as to grant one.

"[I]f the BZA's findings are merely a general replication of the requirements of the ordinance at issue, they are insufficient to support the BZA's decision." *Riverside Meadows*, 72 N.E.3d at 540. Here, the BZA's findings regarding the CAFO's impact and general compatibility with surrounding properties—an essential requirement for a Special Exception—consisted *at most*

of ultimate determinations that the Ordinance's requirements were met, and did not include the detailed findings needed for intelligent appellate review. Further, most of the relevant evidence before the BZA was simply ignored, and the concerns raised to the BZA about the CAFO's incompatibility with neighbors' properties were brushed aside. Thus, the BZA's decision does not meet the requirements for a valid special exception under the Ordinance, and also violates the written findings requirements of both the Ordinance (Section 10.2, App. VI:24-25) and I.C. § 36-7-4-918.2. It is therefore void. The trial court's determination otherwise was in error.

E. The Ordinance Required the BZA to Impose a One-Mile Setback Between the CAFO and Harvest Christian Camp

House of Prayer argued before the BZA (App. IV:2, 137-139, V:3-6) and the trial court (App. VI:42, 67-68) that the Special Exception should not be granted because Milco's chosen location is just a half mile from Harvest Christian Camp, and the Ordinance imposes a one-mile setback between CAFOs and schools. The BZA and trial court erred in rejecting this argument, because: (1) the Ordinance's plain language and intent compel treating Harvest Christian Camp as a school for purposes of the setback; (2) as construed by the BZA to exclude youth camps, the setback provision violates Article I Section 23 of the Indiana Constitution, because the disparity in treatment does not inhere in the subject matter and is not available to all who are similarly situated; and (3) as applied in this case, the disparity violates RLUIPA's equal terms provision, 42 U.S.C. § 2000cc(b)(1). Each of these concerns was properly presented to the BZA (App. IV:138-140); nonetheless, the BZA entered no findings to explain why it did not apply the one-mile setback to Harvest Christian Camp.

1. The BZA's reading of the setback provision ignores the Ordinance's plain language

Section 7.10.2(e) of the Ordinance requires a "[s]eparation distance from an existing CFO/CAFO structure or school [to] be a minimum of one (1) mile which shall be measured from the nearest CFO/CAFO structure to the school." The term "school" is not defined in the Ordinance. The BZA did not formally construe the setback provision, and made no findings as to whether Harvest Christian Camp is a "school" for purposes of the setback. But in approving the Special Exception without requiring a one-mile setback from Harvest Christian Camp, the BZA implicitly concluded that the setback provision does not apply to educational institutions like Harvest Christian Camp. That unstated conclusion was wrong, for the following reasons.

"Undefined words in a statute . . . are given their plain, ordinary, and usual meaning." *600 Land, Inc. v. Metro. Bd. of Zoning Appeals*, 889 N.E.2d 305, 309 (Ind. 2008). "In determining the plain and ordinary meaning of a term, courts may use English language dictionaries as well as consider the relationship with other words and phrases." *Id.* There are many English language dictionaries, but this Court most commonly turns to the Merriam-Webster online dictionary for ordinary English words,[9] and to *Black's Law Dictionary* for legal terms of art.[10]

House of Prayer, by counsel, presented the Merriam-Webster definition of "school" to the BZA: "an organization that provides instruction [such as] an institution for the teaching of children." (App. IV:138; *see* https://www.merriam-webster.com/dictionary/school) *Black's* likewise defines "school" as "[a]n institution of learning and education, esp[ecially] for children."

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[9] *E.g. In re Name Change of A.L.*, 81 N.E.3d 283, 285 n.1 (Ind. Ct. App. 2017) ("transgender"); *Mizen v. State ex rel. Zoeller*, 72 N.E.3d 458, 470 (Ind. Ct. App. 2017), trans. denied ("divert").
[10] *E.g. Cheek v. State*, 79 N.E.3d 388, 393 (Ind. Ct. App. 2017) ("personal recognizance"); *Ind. Dep't of Child Servs. v. J.D.*, 77 N.E.3d 801, 809 (Ind. Ct. App. 2017), trans. denied ("competent evidence").

Black's Law Dictionary 1372 (8th ed. 2004).[11] Harvest Christian Camp is undisputedly an organization and institution that educates children. The Camp is therefore a "school" in the ordinary sense, which matches the legal definition. The BZA has no discretion to override the Ordinance's plain language. Accordingly, the Camp is entitled to the protection of the Ordinance's one-mile setback for that reason alone.

Statutory terms are to be read in accordance with legislative purpose, and that principle also reinforces why the BZA's interpretation of the one-mile setback is wrong here. Although the BZA made no findings on this point, Milco and the BZA argued to the trial court that there are many differences between "youth camps" like Harvest Christian Camp and those schools regulated by the Indiana Department of Education. However, these differences have little relation to the Ordinance's purpose, which is to regulate not education but land use, so as to promote "public health, safety, comfort, convenience, and general welfare." *Flat Rock*, 70 N.E.3d at 851 (quoting Ordinance preamble). On that front, House of Prayer provided extensive evidence demonstrating that little distinguishes the Camp from a school, particularly with respect to public health and safety: the Camp on average has 500 children ages 4-17 attending its day and overnight programs during the summer months along with staff, volunteers, and teachers who are present depending on the activities and time of day; can accommodate 128 children overnight in its 13 open-air cabins; has three classrooms/dorms and two multi-purpose buildings with offices, a sanctuary, kitchen and shop; and also hosts Bible classes, retreats and other events throughout the year. (App.

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[11] *Black's* qualifies this definition with a blockquote from 68 Am. Jur. 2d Schools 1, at 355 (1993), which notes that "school" in a statute often refers specifically to "public common schools." However, that is undisputedly not the case here, as Milco and the BZA have defended this provision against House of Prayer's RLUIPA challenge precisely on the basis that it applies equally to secular (i.e. public) and religious schools. (App. VI:178, VII:76)

III:93-94, IV:137-139, 242) Further, while children attend a typical public school for less than a third of the day and spend most of that time indoors, the children attending summer programs at Harvest Christian Camp are housed in open-air cabins and are thus exposed to airborne emissions 24 hours a day. Thus, even setting aside the Ordinance's plain language, construing the Ordinance in accordance with its public-health purpose, the reasons for the school setback provision apply with equal force to Harvest Christian Camp. Accordingly, the trial court should have held that the BZA had no discretion to determine otherwise, rendering the Special Exception "*ultra vires* and void." *Flat Rock*, 70 N.E.3d 858.

2. Under the BZA's application, the setback provision violates House of Prayer's right to equal privileges and immunities under Art. I, Section 23 of the Indiana Constitution

Even if the BZA had discretion to disregard the Ordinance's express language and purpose, its reading of the setback provision violates House of Prayer's rights under Article I Section 23 of the Indiana Constitution ("Section 23") which requires that any privilege granted by law must "equally belong to all citizens, upon the same terms." As a threshold matter, Section 23 applies only if the government action treats different groups differently. *Monarch Beverage Co. v. Cook*, 48 N.E.3d 325, 331 (Ind. Ct. App. 2015), trans denied. In granting the Special Exception, the BZA interpreted the Ordinance to give other types of schools,[12] but not youth camps, a one-mile setback from CAFOs. Thus, there is disparate treatment. The standard for determining whether this

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[12] As the BZA entered no findings on this point, it is unclear exactly which educational institutions the BZA considers to be "schools." The trial court however assumed that the distinction was between educational institutions regulated by the Department of Education and subject to compulsory attendance regulations (like public and charter schools), and those not subject to such regulations (like Harvest Christian Camp). (Trial Court Order at 6)

disparate treatment violates Section 23 is well-established: "First, the disparate treatment accorded . . . must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). As construed and applied by the BZA in this case (to apply to certain types of schools but not to youth camps), the setback provision fails both prongs of the *Collins* test.

First, the distinction between a children's educational institution like Harvest Christian Camp, and a children's educational institution like a public school, does not inhere in the subject matter of the setback provision. The trial court concluded that House of Prayer failed to negate "every conceivable basis" for distinguishing between youth camps and other schools, detailing various grounds for distinguishing Department of Education-regulated schools from others. (Trial Court Order at 5-6, quoting *Collins*, 644 N.E.2d at 81) However, this "every conceivable basis" test applies only to challenges to the "unreasonableness of the classifications." *Paul Stieler Enters., Inc. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014). It does not apply to a challenge like this one, based on "the lack of reasonable relation of the disparate treatment to the inherent distinguishing characteristics of the two classifications." *Id.* Accordingly, the trial court applied the wrong standard and therefore reached the wrong conclusion.

Undisputedly, the setback provision treats "schools" (however defined) differently from other land uses. There are not many "reasonable relations" to the "distinguishing characteristics of those two classifications" that could support a one-mile setback from CAFOs only for schools, other than protection of children's health. CAFOs don't typically expose children to immoral or criminal behavior, so the reasons for a setback from strip clubs or halfway houses don't apply. And the protection isn't likely traffic-related; many facilities impose worse traffic burdens than

CAFOs. And in any event, the analysis for traffic would involve truck routes rather than a straight-line distance. Noise and glare travel in straight lines, but are not a major concern here. (App. V:107) That leaves only the CAFO's noxious airborne emissions, which impose a disruptive nuisance from odors, and a health nuisance from the chemicals and bacteria carried in those odorous emissions.

Since the concern is protecting children from CAFOs' noxious emissions, there is no reason to deny the setback to youth camps, where children are exposed to outdoor air 24 hours a day, while granting it to other schools where outdoor exposure is more fleeting. The health threats (detailed at length in the expert testimony before the BZA by Dr. Indra Frank, App. III:95-99, IV:144-151) are the same in both cases. And both youth camps and public schools (unlike other places where children might occasionally congregate) have assumed responsibility for the welfare of the children in their care.

And even if the one-mile protection is only to protect children from the distraction of livestock odors (which seems unlikely),[13] there is little difference between schools and religious youth camps in that respect: as House of Prayer's counsel observed to the trial court, it's hard to focus on holy matters when all you can smell is animal waste. (Tr. 24:21-23) Accordingly, whether the concern motivating the one-mile setback from schools is public health or disruptions, excluding youth camps from the classification of "schools" that the setback was enacted to protect has no foundation in the "inherent distinguishing characteristics of the two classifications" (*Paul Stieler*,

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[13] If distraction were the motivating concern for the disparate treatment of schools, one would expect the Ordinance to contain a bevy of school-specific setback requirements for distractors like airfields, windmills, trucking companies, and pastures for grazing livestock. Thus, children's health appears to be by far the most likely basis for the setback.

2 N.E.3d at 1277) under the Ordinance, and therefore fails the first prong of *Collins*. The BZA's reading and the trial court's affirmation of that reading therefore violates Section 23.

As to the second *Collins* prong, the preferential treatment accorded to schools under the BZA's interpretation of the Ordinance is not equally available to all who are similarly situated. Even if Harvest Christian Camp is not a "school," it is an educational institution for children, charged with a legal duty to protect the health and welfare of children entrusted to its care, and located less than a mile from a proposed CAFO. The children at the Camp are no less likely to suffer from asthma than children attending a school. The Camp is therefore similarly situated to a similarly-located school. Yet it does not get the same setback other schools get. Accordingly, the BZA's interpretation of Section 7.10.2(e) as not requiring a one-mile setback between Harvest Christian Camp and Milco's CAFO fails the second prong of *Collins* and therefore again violates Article I, Section 23 of the Indiana Constitution.

3. The BZA's application of the setback provision to exclude Harvest Christian Camp violates RLUIPA because it implements a land use regulation on less than equal terms with nonreligious institutions

RLUIPA's "equal terms" provision provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). The Special Exception and the interpretation of the school setback provision are implementations of "a land use regulation," namely the Ordinance.[14] The BZA therefore violated RLUIPA's equal terms

[14] The trial court's conclusion that the Ordinance and Special Exception are *not* land use regulations is addressed in the below discussion of RLUIPA's substantial burden provision.

provision by not giving Harvest Christian Camp, a religious educational institution, the one-mile setback that it was required to give to other educational institutions.

Under the Seventh Circuit's analysis, a RLUIPA equal terms violation is established when differential treatment is not based on "accepted zoning criteria." *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 373 (7th Cir. 2010). Notably, the Seventh Circuit adopted this reading over the "regulatory purpose" test used in other circuits because it considered "regulatory purpose" too vulnerable to the regulator's self-serving testimony. *Id.* at 371. The tests reach "essentially the same result" despite "differences in the mechanism." *Third Church of Christ v. City of N.Y.*, 626 F.3d 667, 670 (2d Cir. 2010). This Court has not yet adopted either test. But regardless of whether "regulatory purpose" or "accepted zoning criteria" is the proper test, the BZA's implementation of the Ordinance in granting the Special Exception violates RLUIPA.

In regulatory purpose terms, the BZA's allowable purpose in granting and denying special exceptions is limited to effectuating the Ordinance's purpose: promoting public health and welfare and ensuring compatibility with nearby land uses. (App. VI:24) As detailed above, the Ordinance's public health and welfare purpose does not support any distinction between a secular public school and a religious youth camp with respect to airborne emissions from a CAFO. Both are "assemblies" that are "similarly situated" with respect to the CAFO emissions. Accordingly, under a regulatory purpose standard, the regulatory purpose of protecting children's educational institutions from odor nuisances and/or public health threats does not provide any basis for denying a one-mile setback to Harvest Christian Camp.

In terms of accepted zoning criteria, again neither the Ordinance nor the BZA findings set forth any criterion for distinguishing a religious educational institution like a Bible camp from a secular educational institution like a Department of Education-regulated school. And *that*

distinction, rather than any possible distinction between other types of schools or other types of camps, is the distinction the BZA made here. Notably, the rule that the setback applies only to certain types of schools and not to youth camps did not exist until the BZA created it for this case, so it can scarcely be called a "generally accepted zoning criterion."

In this respect the case differs dramatically from *Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013), which Milco's counsel cited before the trial court. (Tr. 39) There, a ban on year-round camps (religious or secular) arose from a general zoning criterion: under long-established zoning, the zone in question was tightly restricted to single-family housing. *Id.* at 683. Here, analogizing from *Eagle Cove*, the general zoning criteria are the one-mile setback and the A-3 district criteria. And neither of those compel any distinction between camps and other types of schools.

Accordingly, there are no relevant zoning criteria to support the BZA's distinction between Harvest Christian Camp and other educational institutions in terms of the CAFO setback. The BZA's denial of the one-mile school setback, and its approval of the Special Exception, therefore violates the equal terms provision of RLUIPA. The trial court's ruling otherwise was in error.

F. The Improper Ex Parte Communications of Commissioner Bacon with the BZA Violated Ind. Code § 36-7-4-920(g) and the Due Process Clause

BZAs "must comply with the constitutional standards of being orderly, impartial, judicious, and fundamentally fair." *City of Hobart Common Council v. Behavioral Inst. of Ind., LLC,* 785 N.E.2d 238, 246-47 (Ind. Ct. App. 2003). The right to an impartial hearing before the BZA is secured under both I.C. § 36-7-4-920(g) and the federal Due Process Clause. *Id.* Indeed, "[a] neutral, unbiased, adjudicatory decision maker is a core requirement of due process." *Harris v. LIHTC*, No. 79A02-1703-SC-638, 2017 Ind. App. LEXIS 493, at *15 (Oct. 13, 2017) (citing

Rynerson v. City of Franklin, 669 N.E.2d 964, 967 (Ind.1996)). As House of Prayer argued to the trial court, its right to an impartial tribunal was violated in this case—a violation that was clearest in the undue influence Rush County Commissioner Mark Bacon exerted on BZA members. (App. VI:89-91)

In deposition testimony, Bacon admitted that before the vote on Milco's application, he spoke with BZA member Trent in the hallway and "made a comment that there was—according to the Ordinance, there was no reason to not pass it." (App. VI:142) Trent confirmed that Bacon approached him in the hallway during the break, and further testified that he heard that Bacon spoke with other BZA members to influence the vote and that an executive session was held to discuss the matter. (App. VI:119-120)

Milco moved to strike the BZA members' own testimony on this point as hearsay, but the trial court denied the motion. (Tr. 8:22) However, Despite Bacon's own testimony as to his actions and intent, the trial court uncritically accepted the BZA members' testimony that they had not been influenced. (Trial Court Order at 2-3) The record does not support that finding; but regardless, Bacon's undisputed ex parte communications with at least one BZA member squarely violated the statute governing BZA proceedings: "[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." I.C. § 36-7-4-920(g).

1. The trial court erred in applying the Metro Board *test*

When a trial court applies the wrong legal standard, it commits clear error. *Town of Fortville*, 51 N.E.3d at 1198. In rejecting House of Prayer's undue influence arguments, the trial court stated:

> There are two key questions to consider when analyzing an undue influence allegation: (1) whether new information was presented to the board outside of a hearing; and (2) whether the complaining party had a chance to respond to that information.

(Trial Court Order at 7) In support, the trial court cited *City of Hobart,* 785 N.E.2d at 251-52, and *Metro. Bd. of Zoning Appeals v. Standard Life Ins. Co.*, 145 Ind. App. 363, 368, 251 N.E.2d 60, 62-63 (1969), trans. denied (the source of this test). But again, the trial court applied the wrong test.

This Court has referred to the *Metro Board* test as a "safe harbor" that applies when there is concern for a petitioner's due process rights of notice and rebuttal. *City of Hobart*, 785 N.E.2d at 253. But in *City of Hobart*, the Court specifically distinguished *Metro Board* from facts such as presented in this case, where the concern is a violation of the right to an impartial tribunal. *Id.* at 253-254. Specifically, in *City of Hobart,* the Court considered what it described as a "blatant attempt" by the local school system to influence one councilwoman's decision, through an ex parte communication with the councilwoman, who was a school system employee. *Id.* at 253 This Court held that such ex parte conversations seeking to influence a member's vote "do not fall within the protection of *Metro. Bd.*" because *Metro Board* "was concerned with a petitioner's due process rights of notice and ability to rebut evidence." *Id.* In contrast, the improper contacts of the school system in *City of Hobart* "created a strong impression of undisclosed partiality" and therefore "the only appropriate decision that [the councilwoman] could have made . . . would have been to recuse herself from the proceedings." *Id.* at 253-254.

Like the school system in *City of Hobart*, Commissioner Bacon blatantly sought to influence the BZA decision through ex parte communication. And just as the school system was closely tied to the council member in *City of Hobart*, here there is a close connection between a

county commissioner like Bacon (overseeing the whole of county government) and the BZA. Therefore, the due process violation is at least as severe as in *City of Hobart*.

Finally, as detailed throughout this Brief, the BZA decision rests on a tissue of conclusory determinations that ignore the evidence before the BZA. The mismatch between evidence and conclusion raises a reasonable inference that the decision was reached on an improper ground. The likelihood of improper influence is further borne out by the contrast between the BZA's threadbare findings and the BZA's own rulings and arguments before this Court in *Flat Rock*. Accordingly, the ex-parte communications of Commissioner Bacon with at least one BZA member violated both the statutory prohibition on such communications set forth in I.C. § 36-7-4-920(g)[15] and the Due Process Clause of the Fourteenth Amendment of the US Constitution, the resulting BZA decision should have been reversed by the trial court.

G. The BZA Decision Violated House of Prayer's Protected Religious Rights

House of Prayer is a religious institution that has run Harvest Christian Camp as a core ministry since 1984. (App. IV:129-130, 138-139) State and federal law provide constitutional and statutory protections for religious institutions and activities, which House of Prayer's counsel raised at the BZA hearing. (App. IV:139-140, V:7) The BZA entered no findings on this point. Because the Special Exception violates both state and federal law by impermissibly burdening Harvest Christian Camp's religious exercise, the trial court should have reversed the BZA's grant of the Special Exception.

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[15] "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."

1. The Special Exception burdens House of Prayer's religious mission

The trial court concluded that House of Prayer "failed to introduce any evidence of any burden on religion." (Trial Court Order at 9) If this were true, it would be fatal to all of House of Prayer's religious freedom claims, because the applicable laws all require either a "material" or "substantial" burden on religion. But the record does not support the trial court's conclusion, for which it gave the following rationale:

> Petitioner presented no evidence that any church members, leaders, or students would discontinue worshipping at Petitioner's location if the dairy was built. There was no evidence before the BZA that the special exception will cause Petitioner to stop its services or summer camp. There was no evidence the special exception will prevent Petitioner from continuing its ministry.

(Trial Court Order at 10). There is no legal authority for these highly specific *post hoc* evidentiary requirements. Indeed, courts have frequently found "substantial" burdens that were far less substantial than the health impacts that House of Prayer has shown.[16] Further, these requirements mandate a showing that can be made only after an injury has occurred (i.e. after the CAFO is built and Harvest Christian Camp has been forced to end or radically change its operations).[17] If this were a tort action to remedy a legal injury, these proof requirements might make sense. But in a zoning proceeding, the point is not to remedy an injury caused by an incompatible land use but to prevent such injuries in the first place. That orientation toward preventing incompatible land uses is precisely why this Court approved the trial court's holding in *Flat Rock* that—even though no

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[16] For example, unjustified delay in permitting a new church location may be a substantial burden. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

[17] It is unclear what difference it would have made if some parents *had* sworn out affidavits that they would leave the Camp if the CAFO was built. Such inherently nonbinding statements of a conditional future intention would demonstrate very little, compared to the expert public health testimony and supporting documentation that House of Prayer submitted.

windmills had been built and therefore any harms were at least as speculative as those here—the special exception would have "failed to satisfy the Zoning Ordinance" without the expanded setback the BZA imposed. 70 N.E.3d at 854.

As detailed in the Statement of Facts, House of Prayer's evidence of religious burden included the testimony of a physician and public health expert on the life-threatening health risks Milco's CAFO creates for children entrusted to House of Prayer's care, and the impact the CAFO would have on House of Prayer's ability to comply with its legal duty to safeguard those children's health and well-being. (App. VI:67-71, VII:100) This testimony was substantially uncontroverted, being rebutted only by an engineer without public health expertise, who did not take issue with any of Dr. Frank's health-related conclusions, such as heightened asthma risk, but addressed only certain subsidiary points related to total manure volume, application rates, and antibiotic use. (App. IV:76-78)[18] It is unclear what additional proof House of Prayer could possibly have provided to demonstrate what is necessarily a *future* injury. These proven health issues are a severe burden: as House of Prayer argued before the trial court (App. VII:100), state action that makes it impossible to continue a ministry like the Harvest Christian Camp—as House of Prayer's uncontroverted evidence shows that the Special Exception will do—does not materially differ from action that directly prohibits that ministry.

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[18] To the extent the BZA may have relied on this limited rebuttal that did not address public health concerns, the engineer's report contained a number of glaring deficiencies that should have been apparent to the BZA, including reading a wind rose backward, as House of Prayer noted to the trial court. (App. VII:95-96) But it is impossible from the BZA findings to know whether the BZA took the engineer's report into account at all.

In sum, House of Prayer properly showed that the Special Exception would burden its religious mission by imperiling the health and safety of the children entrusted to its care. And as set forth below, that burden is both material and substantial.

2. *The BZA decision violates RLUIPA by substantially burdening House of Prayer's religious practice without a compelling government interest*

The BZA grant of the Special Exception violates the substantial burden provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a). Under RLUIPA, land use regulations may not impose a substantial burden on religious exercise by limiting the religious use of land unless they further a compelling government interest by the least restrictive means. *Id.* No discriminatory intent is required: "RLUIPA's substantial burden provision says nothing about targeting." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 556 (4th Cir. 2013). Thus, RLUIPA's substantial burden provision "backstops the explicit prohibition of religious discrimination . . . much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Put another way, the substantial burden provision addresses the problems that arise for religious exercise when "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Id.* Thus, if the Ordinance gives the BZA unfettered discretion to decide what conditions are required for a special exception, as the trial court concluded (Trial Court Order at 16), then this is precisely the situation RLUIPA's substantial burden provision was written for.

The trial court based its decision in part on the lack of case law supporting House of Prayer's position. (Trial Court Order at 9) Notably, however, there was also no case law *against*

that position. The lack of precedent is unsurprising: from the law's enactment in 2000 to 2016, only 100 justiciable pleadings were filed in any court asserting RLUIPA substantial burden claims. Daniel P. Dalton, *Litigating Religious Land Use Cases* 283 (2nd ed. 2016). The caselaw is so sparse because religious organizations typically litigate only as a last resort. *Id.* at xxiii (observing that "[o]nly when there are no other available options will the religious organization begin to *even consider* litigation"). So the absence of controlling authority on any specific point is scarcely surprising. And, in any event, by RLUIPA's plain terms, this case meets all the requirements for RLUIPA to apply.

(a) RLUIPA applies because the Special Exception is a land use regulation

The trial court rejected House of Prayer's RLUIPA arguments on the theory that the Special Exception is not a "land use regulation" under RLUIPA. (Trial Court Order at 9) In so holding, the trial court misinterpreted the law.

A "land use regulation" under RLUIPA is defined as:

> a zoning or landmarking law, *or the application of such a law*, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.
>
> 42 U.S.C. § 2000cc-5(5) (emphasis added).

Based on the use of "regulated" at the end of this definition, the trial court held that the Special Exception is not a "land use regulation," because it "regulates" only Milco's property, not Harvest Christian Camp. (Trial Court Order at 11)

"Our first task when interpreting a statute is to give its words their plain meaning, considering the text and structure of the statute as a whole." *C.H. v. A.R.*, 72 N.E.3d 996, 1001

(Ind. Ct. App. 2017) (internal punctuation omitted). And where there is ambiguity, RLUIPA is to be construed broadly to protect religious exercise. 42 U.S.C. § 2000cc-3(g).

Applying these principles here, the term "regulated" at the end of the definition refers back to the defined term, "land use regulation." And if a "land use regulation" is an application of a zoning law—here the Special Exception applying the Ordinance—that "limits or restricts" the claimant's use of land—here Harvest Christian Camp—then land is "regulated" to the extent its use is "limit[ed] or restrict[ed]" as a result. "Regulated" is therefore synonymous with "impacted by the regulation." And while this may not be the typical meaning of "regulated," it flows directly from the similarly nonstandard definition of "land use regulation" that Congress adopted in this definition. Giving "regulated" and "regulation" inconsistent meanings would make a hash of the statutory scheme. And to the extent of any doubt on this point, the Congressional directive to construe RLUIPA broadly (42 U.S.C. § 2000cc-3(g)) must control.

In support of its narrower interpretation of "land use regulation," the trial court cited *Taylor v. City of Gary*, 233 F. App'x 561, 562 (7th Cir. 2007). (Trial Court Order at 11) But *Taylor* supports House of Prayer's reading: "a land use regulation is defined as a regulation that restricts a claimant's ability to use land in which he holds a property interest." *Id.* [19] And that reading is well-established in the Seventh Circuit and beyond. *See Id.,* citing *Vision Church*, 468 F.3d at 998, quoting *Prater v. City of Burnside*, 289 F.3d 417, 434 (6th Cir. 2002) (holding that "a government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking

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[19] In *Taylor*, a minister wanted to make the city of Gary give him an abandoned church. 233 F. App'x at 562. The minister's RLUIPA claim failed under 42 U.S.C. § 2000cc-5(5) because he had no property interest *in the property he wanted to use*. *Id.* In contrast, here House of Prayer undisputedly owns the Harvest Christian Camp property.

law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest"). In other words, the term "regulated land" does not create a new jurisdictional limitation; "regulated land" is just land that a "land use regulation" impacts.

On this point, the *Northern Cheyenne* litigation over South Dakota's Bear Butte provides a helpful example in which RLUIPA applied to a land-use decision that interfered with a nearby religious use. Bear Butte is a "site of great spiritual significance for certain Native American tribes." *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1083 (8th Cir. 2006). The local government obtained federal funding to build a shooting range on land nearby. *Id.* Six tribes with property interests in land at Bear Butte brought suit to enjoin both the construction and the funding under theories including federal RFRA and RLUIPA. *Id.* The tribes "asserted that by placing the shooting range within *earshot* of Bear Butte, defendants' land use regulation had limited and restricted the tribes' use of their land." James D. Leach, *A Shooting Range at Bear Butte: Reconciliation or Racism?*, 50 S.D. L. Rev. 244, 278 (2005). In other words, the tribes' RLUIPA claim was for indirect governmental interference with land use through actions directed to neighboring land, rather than a direct government regulation—just as is the case here. Although the *Northern Cheyenne* litigation was mooted before final judgment (reaching the Eighth Circuit only on the ensuing fee dispute), the district court granted a preliminary injunction on the RLUIPA and RFRA counts after concluding that the tribes were likely to succeed on the merits. 433 F.3d at 1084; *N. Cheyenne Tribe v. Martinez*, Case No. 5:03-cv-05019 (D.S.D. Apr. 10, 2003), at ¶¶26,34 (Karen E. Schreier, J.).

The question of whether the indirectness of the government action barred the tribes' RLUIPA claim apparently never came up. But it wouldn't have been much of a question anyway, because *Northern Cheyenne* is a classic RLUIPA case: a land use decision discriminating against

a politically unpopular religion. And although House of Prayer's facts may be less dramatic, no *material* facts distinguish the two cases from the standpoint of RLUIPA's substantial burden provision. In *Northern Cheyenne*, the noise pollution from the shooting range was incompatible with the established religious use of nearby tribal land; here, the air pollution from Milco's CAFO is incompatible with the established religious use of nearby Harvest Christian Camp.

Adopting the trial court's narrow reading of RLUIPA's scope would give local governments free rein to drive out disfavored religious groups by doing what the BZA did here and the local government tried to do in *Northern Cheyenne*: putting incompatible uses nearby. But RLUIPA was enacted because Congress found that land use regulators could too easily hide their discriminatory intent. *See* 146 Cong. Rec. S7774-5 (joint statement of Sens. Hatch and Kennedy) (summarizing three years of hearings to state that in the "highly discretionary and individualized processes of land use regulation," "discrimination against religious uses is a nationwide problem" that is "often covert"). Given this background, it would make no sense to read RLUIPA so narrowly that local governments could control whether it applied by structuring their land-use decisions a certain way. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 218 (2d Cir. 2012) ("declin[ing] to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions").

As the Ordinance recognizes, zoning decisions inevitably balance one use against another. (App.V:118-119) And as Congress recognized in enacting RLUIPA, in this often highly discretionary balancing process, prejudice readily finds expression in giving a religious community's land use interests less weight than their neighbors'. That problem is the same whether a zoning board gives too *much* weight to objections to a religious land use, or, as here, gives too *little* weight to the religious organization's well-founded objections to an incompatible use nearby.

For all of these reasons, the trial court was wrong to conclude that RLUIPA cannot apply to a zoning decision regarding land not owned by a religious organization that nevertheless restricts the use of land that is owned by a religious organization.

(b) The Special Exception substantially burdens Harvest Christian Camp's religious exercise

RLUIPA bans land use regulations that substantially burden religious land use, unless they further a compelling government interest by the least restrictive means. 42 U.S.C. § 2000cc(a)(1),(2). The burden need not differ from that imposed on secular institutions. *Sts. Constantine & Helen*, 396 F.3d at 900. Substantiality is fact-sensitive and relative to the organization's resources. *World Outreach Conference Ctr. v. City of Chi.*, 591 F.3d 531, 539 (7th Cir. 2009). For example, Chicago substantially burdened a small religious organization by obstructing the organization's use of its property for single-room occupancy housing as part of the organization's mission. *Id.*

Here, as shown through the extensive evidence presented to the BZA regarding CAFOs' impacts on children's health, the Special Exception will make it impossible for House of Prayer to safely continue operating Harvest Christian Camp at its current location—a location that is central to its core religious mission of offering a safe and healthy natural setting for children and teens to be educated in faith, enriched in their relationship with God, and enhanced by the outdoors. Even if Harvest Christian Camp could easily relocate elsewhere, the burden would remain substantial. Indeed, government actions forcing a religious organization to find a new location often create substantial burdens under RLUIPA, under far less trying circumstances. *See, e.g., Sts. Constantine & Helen*, 396 F.3d at 900 (finding a substantial burden where a church would have to "search around" for a new location); *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220,

2007 U.S. Dist. LEXIS 28, at *24 (E.D. Mich. Jan. 3, 2007) (finding a substantial burden from denial of a parking variance preventing the church from using its recently-purchased building because "[s]elling its current building and searching for another is not a mere inconvenience").Thus, regardless of whether the Special Exception compels Harvest Christian Camp to shut down, or to relocate at great expense, the burden on House of Prayer is substantial.

(c) The Special Exception does not further a compelling government interest by the least restrictive means

Under RLUIPA, a substantial burden like the one the Special Exception imposes on House of Prayer is prohibited unless it furthers a compelling government interest by the least restrictive means. 42 U.S.C. § 2000cc(a)(2). The Special Exception does not clear this high bar.

First, the only government interest the BZA cited is economic development. (App.V:106)[20] No case has ever held that economic development is a compelling government interest. And in applying identical language in the federal RFRA, the Supreme Court slammed the door on any weighing of economic benefits: "Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).[21]

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[20] In *Flat Rock*, the BZA did not think economic development (to the tune of $305 million and 200 jobs, *see* 70 N.E.3d at 851) could outweigh the project's negative impacts when determining whether to impose an additional setback. The BZA did not explain why it abruptly reversed its priorities between *Flat Rock* and this case.

[21] *Hobby Lobby* addressed the constitutionality of a contraceptive coverage mandate imposed under the Affordable Care Act. 134 S. Ct. at 2759. The court ultimately assumed there was a compelling government interest at stake. *Id.* at 2780. But that "legitimate and compelling interest" was not in a healthy insurance market, but in "the health of female employees." *Id.* at 2786 (Kennedy, J., concurring). So protecting health is a compelling government interest, but protecting private economic interests is not.

Second, even if the government had a compelling interest in economic development, and specifically in permitting a CAFO, there are other places in Rush County where a CAFO could go. Accordingly, the decision to grant a Special Exception for this particular site, where the CAFO will interfere with Harvest Christian Camp's religious exercise, cannot be the least restrictive means of furthering the BZA's goal of allowing a new CAFO.

Thus, the Special Exception substantially burdens House of Prayer, does not further a compelling government interest, and certainly does not do so by the least restrictive means, and therefore violates RLUIPA's substantial burden provision. The trial court's failure to void the Special Exception on this basis was clear error.

3. The Special Exception violates Ind. Code § 34-13-9-8 (RFRA) because it does not further a compelling government interest by the least restrictive means

Under Indiana's RFRA, "a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." I.C. § 34-13-9-8. As with RLUIPA, the only exception is if "the government's imposition of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest." *Tyms-Bey v. State*, 69 N.E.3d 488, 489 (Ind. Ct. App. 2017), trans. denied. RFRA applies across all areas of Indiana law, both civil and criminal. *Id.*

RFRA was only recently enacted, and *Tyms-Bey* is the only published case applying it.[22] But the RFRA standard is identical to RLUIPA's, so the strict scrutiny analysis is also identical. *See Affordable Recovery Hous. v. City of Blue Island*, No. 12-CV-4241, 2016 U.S. Dist. LEXIS 128637, at *19 (N.D. Ill. Mar. 23, 2016) (applying same analysis to identical provisions of state

[22] There have been two unpublished opinions as well, but neither reached the merits of the RFRA claim.

RFRA and RLUIPA). The principal difference is that RFRA lacks RLUIPA's jurisdictional limitations. Indeed, the state legislature intended RFRA to be invoked across a very broad range of proceedings, encompassing even proceedings between private parties. I.C. § 34-13-9-9. Accordingly, RFRA applies even if RLUIPA does not.

As reviewed under RLUIPA, the Special Exception substantially burdens House of Prayer's religious exercise by imperiling the health of the children at Harvest Christian Camp. And that substantial burden does not serve a compelling government interest by the least restrictive means, because economic development (however desirable it may be) is not a *compelling* government interest that can justify interfering with freedom of worship. Thus, RFRA prohibits the BZA grant of the Special Exception, and the trial court therefore should have held that the Special Exception is contrary to law and void.

4. The Special Exception materially burdens the free exercise of religion, a core value of the Indiana Constitution

"[T]here is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate." *Price v. State*, 622 N.E.2d 954, 960 (Ind. 1993). Among these core values is the freedom of religious worship and exercise, which is enshrined in Article I Sections 2 and 3 of the Indiana Constitution. *City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443, 446 (Ind. 2001). A core value may not be materially burdened. *Price*, 622 N.E.2d at 960. A burden is material "[i]f the right, as impaired, would no longer serve the purpose for which it was designed." *Id.* at 960 n.7. In contrast to RFRA and RLUIPA, "[t]he 'material burden' analysis looks only to the magnitude of the impairment and does not take into account the social utility of the state action at issue." *City Chapel*, 744 N.E.2d at 447.

In *City Chapel*, South Bend sought to use eminent domain to evict a church from the downtown location where it conducted a ministry, for purposes of "downtown redevelopment." *Id.* at 444-445. City Chapel objected that displacement would "destroy the church." *Id.* at 445. The Supreme Court sided with City Chapel, remanding the case for an evidentiary hearing because even the otherwise lawful exercise of eminent domain can materially burden freedom of religion where it interferes with free exercise. *Id.* at 451.

As House of Prayer argued to the trial court (App. VII:104-106, Tr. 25-26), this case parallels *City Chapel* in all material respects. First, just as City Chapel's ministry was tightly bound to its longstanding location in downtown South Bend, House of Prayer's ministry of running Harvest Christian Camp is tightly bound to its longstanding location on rural acreage near Shankatank Creek. Second, just as South Bend used its power of eminent domain in hopes of economic development, the BZA used its power to approve the Special Exception for Milco based on (unsubstantiated) claims of economic benefit. Just as that exercise of governmental power prevented City Chapel from performing its ministry, here this exercise of governmental power will prevent House of Prayer from performing its ministry. Third, just as City Chapel could not realistically continue its ministry outside downtown South Bend, an established youth camp cannot simply pull up stakes without ruinous expense.

The main *difference* between the cases is equally revealing. City Chapel would have received fair market value for its location under eminent domain. But if the Special Exception forces Harvest Christian Camp to move, it will get no compensation at all from Rush County. Thus, the burden is much greater here than in *City Chapel*.

Accordingly, by imperiling the health and safety of the children at Harvest Christian Camp and therefore making it impossible for House of Prayer to fulfill its duty of keeping these children

safe, the BZA's grant of the Special Exception materially burdens House of Prayer's religious exercise, in violation of the Indiana Constitution, and should have been vacated by the trial court.

CONCLUSION

For the foregoing reasons, the BZA grant of the Special Exception to Milco to operate a 1400-head dairy CAFO within a half mile upwind of Harvest Christian Camp was arbitrary and capricious, lacked evidentiary support, exceeded the BZA's authority, and infringed on House of Prayer's rights of free exercise and due process. The Special Exception is therefore contrary to law and void. The trial court's denial of House of Prayer's Verified Petition for Judicial Review and Declaratory Judgment should therefore be reversed.

Respectfully submitted,

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APPEALED ORDER

In accordance with Appellate Rule 46(A)(10), a true and correct copy of the trial court's Findings of Fact, Conclusions of Law, and Order Affirming BZA's Decision, issued on July 11, 2017, is attached hereto.

_/s/Kim Ferraro ________________________
Kim E. Ferraro

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Appellant's Brief contains exactly 14,000 words, excluding items listed in Appellate Rule 44(C).

_/s/Kim Ferraro _______________________
Kim E. Ferraro

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Appellant's Brief was delivered this 18th day of October, 2017, to the following persons, via the Indiana E-Filing System:

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