IN THE
INDIANA COURT OF APPEALS

Case No. 19A-PL-01485

RHETT and ALANA LIGHT Petitioners-Appellees, vs. DELAWARE-MUNCIE METROPOLITAN BOARD OF ZONING APPEALS, Respondent	)	Appeal from Grant County Circuit Court Cause No. 27C01-1811-PL-49 The Honorable Mark E. Spitzer, Judge
STEVEN and KATHY CHAMBERS, STEPHEN and ELIZABETH DRISCOLL, and PERRY and TONYA EVANS, Intervenors-Appellants	)	

APPELLANTS' BRIEF

Kim E. Ferraro, Atty. No. 27102-64
Hoosier Environmental Council
541 S. Lake Street
Gary, Indiana 46403
Phone: 219/464-0104
Email: kferraro@hecweb.org

Aaron Corn, Atty. No. 30570-49
Hoosier Environmental Council
541 S. Lake Street
Gary, Indiana 46403
Phone: 219/464-0104
Email: acorn@hecweb.org

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

IN THE
INDIANA COURT OF APPEALS

Case No. 19A-PL-01485

RHETT and ALANA LIGHT Petitioners-Appellees, vs. DELAWARE-MUNCIE METROPOLITAN BOARD OF ZONING APPEALS, Respondent	)	Appeal from Grant County Circuit Court Cause No. 27C01-1811-PL-49 The Honorable Mark E. Spitzer, Judge
STEVEN and KATHY CHAMBERS, STEPHEN and ELIZABETH DRISCOLL, and PERRY and TONYA EVANS, Intervenors-Appellants	)	

APPELLANTS' BRIEF

I. STATEMENT OF ISSUES

Whether the trial court erred in reversing the Delaware-Muncie Metropolitan Board of Zoning Appeals' ("BZA") decision to revoke a county building permit issued for the construction of a concentrated animal feeding operation ("CAFO") in a zoning district, which the BZA reasonably concluded does not recognize a CAFO as a permitted land use.

II. STATEMENT OF THE CASE

Petitioners-Appellees, Rhett and Alana Light ("the Lights"), brought this proceeding on July 26, 2018 seeking judicial review of the BZA's decision to revoke the building permit issued on May 17, 2018 to Rhett Light by the Delaware County Building Commissioner/Zoning

Administrator ("Zoning Administrator") to construct and operate a hog CAFO in Delaware County ("the building permit"). (App. III:157-242)[1] The BZA responded in opposition to the Lights' judicial review petition. (App. IV:78-84) Intervenors-Appellants, Steven and Kathy Chambers, Stephen and Elizabeth Driscoll, Perry and Tonya Evans, who live near the CAFO property ("the neighbors"), and who appealed the building permit to the BZA, were allowed to intervene in the case on August 26, 2018. (App. IV:68)

On September 13, 2018, the Parties agreed to transfer venue from Delaware to Grant County and to the appointment of Honorable Judge Mark Spitzer as Special Judge. (App. IV:75-76) Thereafter, the BZA filed its certified record of proceedings (App. II:146-III:156), and the matter was fully briefed by the Parties. (App. IV:85-V:174) The trial court heard oral argument on March 19, 2019, after which the court took the matter under advisement. (Tr.) On May 28, 2019, the trial court issued its Findings of Fact, Conclusions of Law and Judgment reversing the BZA's decision and reinstating the building permit to the Lights ("Opinion"). (App. II:15-25). The neighbors filed their Notice of Appeal on June 27, 2019. (App. V:175-189)

III. STATEMENT OF FACTS

The Lights raised three arguments to the trial court for why the BZA's revocation of the building permit should be reversed. The court found one issue to be dispositive; namely, whether the Delaware County Comprehensive Zoning Ordinance ("Zoning Ordinance") recognizes a CAFO as a permitted use in the "F-Farming Zone." (App. II:21-24)

The proceedings before the BZA and the evidence and argument presented to the BZA on that single issue are as follows:

[1] The Lights amended their judicial review petition twice, first on July 30, 2018 and again on August 9, 2019. (App. III:243-IV:27, IV:32-67)

BZA Proceedings

On June 28, 2018, the BZA conducted a full hearing on the neighbors' appeal of the building permit wherein attorneys for the neighbors and the Lights were given equal time to present evidence and argument on the proper interpretation of the Zoning Ordinance. (App.II:146-200) Prior to the hearing, the neighbors and the Lights submitted written briefs and evidence for the BZA's consideration. (App. II:31-145, App. IV:67) The Zoning Administrator submitted a report to the BZA explaining his decision to issue the building permit concluding that a CAFO is a permitted use in the "F-Farming Zone" ("Farm Zone") because "[t]he raising of hogs is an allowed use" in that zone. (App. III:100) The Plan Commission also submitted a case analysis advising the BZA that since the adoption of the Zoning Ordinance in 1973, a "confined feeding operation" has been "considered" a permitted use. (App. II:104)

At the conclusion of the hearing, BZA members asked questions of the attorneys for both Parties, and then voted 5-2 to revoke the building permit. (App. II:194-200) At its next meeting, the BZA issued written findings in support of its decision stating, in relevant part, that "the F Farming Zone does not recognize industrial agricultural uses, such as the Rhett Light CAFO that will generate as much urine and feces as a small town." (App. IV:158-159)

Evidence Presented to the BZA

The evidence presented to the BZA establishes that on March 22, 2018, the Indiana Department of Environmental Management ("IDEM") issued a permit allowing Rhett Light, who lives in Blackford County, to build and operate a CAFO in Delaware County. (App. III:64-95) The IDEM permit contains more than 300 pages of technical plans and drawings indicating that the CAFO will have 10,560 "wean to finish" hogs in four "production buildings," each with

underground waste pits to collect the annual generation of 4.2 million gallons of hog urine, feces, and process waste water. (App. II:152-153, App. III:64-95)

The IDEM permit also confirms that the operation meets the federal definition of a CAFO,[2] and is subject to certain federal Clean Water Act requirements, as well as Indiana's confined feeding regulations. (App. III:64, 75) Neither federal nor state regulations limit air emissions from CAFOs or restrict where they can locate for protection of property values, which is left up to local jurisdictions. (App. II:35-36). And notably, the regulatory definition of a CAFO does not use the term "farm" or characterize a CAFO as a farm. (App. II:163-164, III:50-57) Instead, the definition refers to a CAFO as a "facility" and operation" with "production" and "animal confinement" areas, and "waste containment" areas, structures and systems. (App. III:50-57) As explained by the U.S. Department of Agriculture ("USDA"), there are three "key elements" of the definition that distinguish CAFOs from traditional farms: "[1] animals are confined; [2] they are fed, rather than grazed on grass or other vegetation; and [3] the 'facility' refers to a structure, not an entire farm." (App. III:14)

Another distinction is the environmental and public health risks associated with CAFOs. According to a 2010 report by the National Association of Local Boards of Health and Centers for Disease Control (collectively "CDC"), unlike traditional farms, CAFOs generate enormous quantities of biological waste—more than some U.S. cities—and emit dangerous pollutants into the air including ammonia, hydrogen sulfide, and volatile and semi-volatile organic compounds. (App. III:28-33) These pollutants are extremely noxious and smell much worse than odors

[2] Under the CWA, a "large CAFO" is defined to include animal feeding operations that confine more than "2,500 swine each weighing 55 pounds or more." 40 CFR 122.23(b)(2),(4). (App. II:223, III:56) Thus, the Lights' CAFO with 10,560 finishing hogs, each weighing up to 290 pounds (App. III:19,68), is the equivalent of more than 50,000 hogs each weighing 55 pounds, or 20 times the minimum regulatory animal number/weight threshold for a "large CAFO."

associated with traditional farms. (App. III:7) And, unlike typical farm smells, the putrid air pollution from CAFOs is known to greatly diminish quality of life, reduce property values, alter daily activities, and pose serious health threats to people who live nearby—health threats including bronchitis, pulmonary disease, asthma, and respiratory distress syndrome, irritation to the eyes, nose, and throat, anxiety and depression, memory loss, heart disease, and even death. (App. II:39)

There are approximately 200 homes within one mile of the Lights' CAFO property—45 of those households are within a half-mile and received notice of Rhett Light's permit application to IDEM. (App. II:31, 153, III;86-90) Thereafter, news of the CAFO drew significant public concern and controversy not only about the CAFO's threat to neighbors' health, quality of life, and property values, but also the revelation that Delaware County lacked any zoning regulations for CAFOs to prevent those impacts. (App. III:96-98)[3] Indeed, the legal term "CAFO" is nowhere to be found in the Zoning Ordinance in effect at the time.[4] Instead, the Zoning Ordinance's Farm Zone in Article XII, Section 1 states in relevant part that:

> No building, structure or land shall be used or occupied and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses: . . . "field crops; dairies; tree crops; flower gardening; nurseries; orchards; farms for the hatching, raising and sale of chickens, hogs, cattle, turkeys or other animals; horse farm; sheep raising; breed, boarding or sale of dogs; aquariums. . . . Barns and similar farming buildings.

(App. III:58) CAFOs are not listed.

In turn, the only requirements for these permitted farm uses are that they occur "on a tract of land having a minimum area of five (5) acres" and are "at least two hundred (200) feet from a

[3] This fact apparently caught the County Commissioners by surprise as well, given Commissioner King's statement at a public meeting that, "no one brought it to our attention that there is no [CAFO] regulations in our County." (App. II:32, 165)

[4] As a result of the controversy over the Lights' CAFO, Delaware County has since amended its Zoning Ordinance to regulate CAFOs.

dwelling (other than a farm dwelling), school, church, hospital or institution for human care." (App. III:58) Notably, this farm setback does not comply with Indiana's regulation of CAFOs. (App.II:164-165, *see* 327 IAC 19-12-3)

The fact that CAFOs are not listed as a permitted use in the Farm Zone is not surprising. The Zoning Ordinance was enacted in 1973 when traditional farms were the norm, and Delaware County had no animal confinement operations, much less a CAFO. (App. II:161) Even when the Farm Zone was added to the Zoning Ordinance in 1993,[5] there were just two confinement operations in Delaware County. (Tr. 65; App. II:71) Neither was a CAFO, and both were vastly smaller (100 and 600 sows, respectively) than the Lights' 10,000+ hog CAFO. (Tr. at 65) Thereafter, between 1993 and 1999, three more small confinement facilities were established in Delaware County, one of which apparently expanded to a CAFO in 2017. (Tr. at 24-25, 48; App. II:71, IV:99)[6]

This history is consistent with the USDA's 2009 report on the "industrialization of U.S. livestock farms" marked by the "dramatic transformation" of farming since 1987 to "large-scale industrialized production systems." (App. III:10-12) Notably, the USDA report points to the regulatory definition of a CAFO as "captur[ing] key elements of the transformation" in that a CAFO, unlike a traditional farm, utilizes "a production process that concentrates large numbers of

[5] The BZA record submitted to the trial court inadvertently does not contain a complete copy of Petitioners' Exhibit H submitted to the BZA, which indicates that the Farm Zone was added to the Zoning Ordinance on July 13, 1993. A true and complete copy of Exhibit H is provided for this Court's review on page 2 of Appellant's Appendix Volume VI. The BZA hearing transcript and briefing also confirm the Parties' understanding that the F-Farm Zone was added to the Ordinance in 1993. (App. II:40, 161-162, 191)

[6] This information about the nature, size and number of animals at existing confinement operations in Delaware County was provided to the trial court during oral argument. However, the BZA received only the names of the "five different operations" and the dates that "they were added to the tax rolls." (App. II:71)

animals in relatively small and confined spaces, and substitutes structures and equipment . . . for land and labor." (App. III:14-15) In addition, the USDA explained that by 2009, the term CAFO was "used broadly and interchangeably with terms like industrial-agriculture or factory farms." (App. III:14-15)

Despite this transformation of farming to big industry, Delaware County did not update its Zoning Ordinance to address CAFOs. (App. II:161-162) The County did amend its Subdivision Ordinance in 1997 to require restrictive covenants for subdivisions in or abutting the Farm Zone to notify future homeowners that the subdivision "is in or adjacent to an area zoned for agricultural uses" including "confinement feeding operations." (App. IV:223) However, the County did not similarly amend the Zoning Ordinance to include "confinement feeding operations" or CAFOs as permitted uses in the Farm Zone. (App. II:161-162) Nor did the County define the term "confinement feeding operations" in either ordinance to make clear that the term includes CAFOs. (App. IV:223, VI:25-28)

Consequently, two decades later, when the controversy over the Light CAFO ensued, the question arose as to whether a CAFO is a permitted use in the Farm Zone. (App. II:32, 165, III:96-99) Adding to the confusion, the County Commissioners' attorney, John Brooke, publicly advised the Commissioners that "a CAFO is not considered an agricultural use" under other county ordinances that he reviewed. (App. II:165) He went on to explain that the County's existing confinement operations had simply been "place[d] in areas that are zoned a-agricultural" since "the county did not have zoning regulations concerning confined animal feeding operations." (App. II:32, App. III:98)

Consistent with Mr. Brooke's explanation of the County's de facto practice, the County's Zoning Appeals Planner, Fred Daniels, stated his interpretation in an email to one of the neighbors

that a CAFO is allowed in the Farm Zone because the "Zoning Ordinance treats all agricultural uses the same." (App. IV:218) Similarly, the Plan Commission's Executive Director, Marta Moody, provided her view that the "Zoning Ordinance allows agricultural uses in the Farming Zone that include crops and farm animals (whether confined or free range)." (App. IV:221)[7]

Also as a result of the controversy over the Light CAFO, the County Commissioners enacted a Moratorium on "the approval of building permits for any new or expanded Confined Feeding Operation (CFO) as defined in 327 IAC 19-2-7 or Concentrated Animal Feeding Operation (CAFO), as defined in 40 CFR § 122.23 in Delaware County. . . until repealed by an ordinance establishing appropriate rules and regulations for animal feeding operations." (App. IV:62-63) This Moratorium, enacted on May 21, 2018, was "in recognition of the significance of this matter in light of the questions and concerns raised by residents of Delaware County." (App. IV:62) However, the Commissioners voted that the Moratorium would not apply to the Light CAFO because the County had just issued the building permit to Rhett Light, and the Zoning Ordinance "currently provides that an animal feeding operation of any size is considered a permitted use in the F-Farming Zone." (App. IV:62) Because the Zoning Ordinance "provides" no such thing, the neighbors brought the matter to the BZA. (App. II:26)

Legal Authorities Provided to the BZA

At the BZA hearing and in their written briefs to the BZA, the Parties also relied on certain legal authorities to support their respective positions. The neighbors provided a copy of the federal CAFO rule setting forth the legal definition of a CAFO. (App. III:50-57) The neighbors also presented the decision in *T.W. Thom Constr. v. City of Jeffersonville,* 721 N.E.2d 319, 325 (Ind.

[7] Although the BZA was not privy to Fred Daniels and Marta Moody's emails, the Lights submitted them to the trial court, which found them to be material. (Opinion at 5; App.II:19).

Ct. App. 1999), wherein the appeals court held that, "when a zoning ordinance permits specified uses in specific zoning districts, all other uses in those districts are forbidden absent a special use permit or variance"—a holding that is based on "the long-standing principle of statutory construction . . . that the enumeration of certain things in a statute necessarily implies the exclusion of all others." (App. 144-156)

For their part, the Lights insisted that their operation is not a CAFO under federal or state law. (App. II:177, 190, 197-179)[8] Instead, the Lights asserted that their operation falls within the definition of an "agricultural purpose" under Indiana's building safety statute (Ind. Code § 22-12-1-2), which includes "farming, dairying, pasturage, apiculture, horticulture, floriculture, vitaculture [viticulture], ornamental horticulture, olericulture, pomiculture, animal husbandry, and poultry husbandry." (App. II:72) Also, the Lights relied on *Indiana Fire Prevention Building and Safety Commission v. Rose Acre Farms, Inc.*, 530 N.E.2d 131 (Ind.App. 1988), wherein the Court of Appeals held that "the size and nature of a farming operation does not remove it from the exemptions granted to an agricultural enterprise" under Indiana's building safety statute. (App. II:72)

The Trial Court's Reversal of the BZA

After considering the evidence and legal arguments of the Parties, the BZA agreed with the neighbors that a CAFO is an "industrial agricultural use" that is not a permitted use in the Farm Zone. (App. IV: 158-159) The trial court disagreed with that assessment and, instead, concluded that the Farm Zone "language clearly indicates that hog raising operation, in barns, are a permitted use" and that "clear language . . . itself is sufficient to answer to the question presented." (Opinion

[8] However, in response to questioning by a BZA member, the Lights' attorney admitted that the operation meets the regulatory definition of a "large CAFO." (App. II:198)

at 8; App. II:22) The trial court also "identifie[d] the facts relevant to its determination" including: language referencing "confinement feeding operations" in the 1997 Subdivision Ordinance; the recent Moratorium on CAFOs and CFOs; and the fact "that there were other confined feeding operations permitted in Delaware County following the passage of the zoning ordinance." (Opinion at 8; App. II:22)

As discussed below, the trial court impermissibly reweighed the evidence and failed to defer to the BZA's reasonable interpretation of its own Zoning Ordinance.

IV. SUMMARY OF ARGUMENT

The BZA's decision to revoke the building permit was based on its reasonable interpretation of the Farm Zone as allowing traditional farming uses, but not CAFOs. The Farm Zone language lists a number of different, permitted land uses including "raising hogs" and "barns", but does not include the term CAFO—a distinct, legally defined category of land use. Furthermore, the BZA's decision is supported by evidence in the record that: (1) CAFOs are not the same as traditional farms in terms of their industrial nature, scale and impact; (2) CAFOs are subject to federal and state regulation that traditional farms are not; and (c) there were no CAFOs in Delaware County at the time the Zoning Ordinance was enacted in 1973, or when it was amended in 1993 to add the Farm Zone. Based on this evidence and the ambiguous language of the Farm Zone on the issue of CAFOs, it was reasonable for the BZA to conclude that CAFOs were either not contemplated or were intentionally excluded by the drafters of the Farm Zone. The trial court's disagreement with that view, no matter how reasonable it may be, is insufficient to warrant reversal of the BZA's decision. Accordingly, this Court should reinstate it and overturn the trial court's decision.

V. ARGUMENT

A. Standard of Review

On judicial review of a BZA decision, the trial and appellate courts are subject to the same standard of review. *Midwest Minerals Inc. v. Bd. of Zoning Appeals of Area Plan Com'n of Vigo County*, 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008). That standard is set forth in Ind. Code § 36-7-4-1614, which provides that "[t]he burden of demonstrating the invalidity of a zoning decision is on the party . . . asserting invalidity." The reviewing court "shall grant relief . . . only if the court determines that . . . the zoning decision is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) contrary to constitutional right, power, privilege, or immunity;
(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(4) without observance of procedure required by law; or
(5) unsupported by substantial evidence.

Id.

Under this standard, the party seeking to overturn a BZA decision "labors under a heavy burden" because the reviewing court must "presume the determination of the [BZA], an administrative agency with expertise in zoning matters, is correct." *Midwest Minerals Inc.*, 880 N.E.2d at 1268; *see also Town of Munster Bd. of Zoning Appeals v. Abrinko*, 905 N.E.2d 488, 491 (Ind. Ct. App. 2009) (the court's "review begins with the presumption that the BZA, due to its expertise in zoning matters, reached a correct decision"). Accordingly, the court may not "reweigh the evidence or substitute [its] decision for that of the [BZA's]." *Id*. And, "unless the BZA's decision [is] illegal, it must be upheld." *McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Comm.*, 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991). The trial court failed to follow this standard.

B. The BZA's Interpretation of the Zoning Ordinance is Reasonable and Entitled to Deference

"The interpretation of an ordinance is a question of law to which this [C]ourt owes the trial court's holding no deference." *T.W. Thom Constr.,* 721 N.E.2d at 324. Furthermore, "[i]n reviewing a BZA's interpretation of its zoning ordinance, "the express language of the ordinance controls" and the reviewing court's "goal is to determine, give effect to, and implement the intent of the enacting body." *Hoosier Outdoor Advertising Corp. v. RBL Mgmt., Inc.,* 844 N.E.2d 157, 163 (Ind. Ct. App. 2006). "When an ordinance is subject to different interpretations, the interpretation chosen by the [BZA] . . . is entitled to great weight, unless that interpretation is inconsistent with the ordinance itself." *Id.* Thus, "if a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by [the BZA,] . . . the court should defer to the [BZA]." *Id.* In other words, if the reviewing court finds the BZA's interpretation to be reasonable, "it should end its analysis and not address the reasonableness of the other party's interpretation." *Id.* That is what the trial court should have done here.

1. The Farm Zone Language is Ambiguous as to Whether CAFOs are Allowed

Instead, the trial court rejected the BZA's interpretation concluding that the Farm Zone unambiguously allows CAFOs because it "clearly indicates that hog raising *operation,* in barns, are a permitted use" and that "clear language [is] . . . itself is sufficient to answer the question presented." (Opinion at 8; App. II:22 (emphasis added)) The trial court is wrong on this point for at least three reasons. First, contrary to the trial court's reading, nowhere does the term "operation" appear in the Farm Zone's text, and that term adds unique meaning[9] not intended by the drafters.

[9] *See* Merriam-Webster Dictionary definition of "operation" at https://www.merriam-webster.com/dictionary/operation.

Second, whether a "hog raising operation" is allowed in the Farm Zone, does not answer the relevant question of whether a CAFO is allowed. By legal definition CAFOs are distinct from traditional farms. *See* 40 CFR §122.23; Ind. Code §§ 13-11-2-38.3 and 40. And, the evidence before the BZA, including reports from the USDA and CDC on the industrial scale, nature and impact of CAFOs demonstrate they are nothing like traditional farms. Moreover, the County Commissioners' own attorney acknowledged the ambiguity explaining that "a CAFO is not considered an agricultural use" under other county ordinances that he reviewed. (App. II:165) Thus, the BZA reasonably resolved that ambiguity to conclude that the Farm Zone does not allow CAFOs.

The Farm Zone's ambiguity is also seen under the "well-settled rule [of statutory construction] that when a zoning ordinance permits specified uses in specific zoning districts, all other uses in those districts are forbidden absent a special use permit or variance." *T.W. Thom Constr*, 721 N.E.2d at 325. To illustrate, the appeals court in *T.W. Thom Constr.*, held that a city zoning ordinance which did not specify "mobile home parks" as a land use in any zoning district, did not allow such developments by implication because "mobile home parks are not just another residential use but a distinct category of use unlike any other." *Id.*

Similarly, in *Day v. Ryan*, stockyards were not allowed under a county zoning ordinance which identified "feedlots" and "livestock sale barns" as permitted uses in the agricultural zone, but not stockyards. 560 N.E.2d 77, 82 (Ind. Ct. App. 1990). Similar to the Lights' argument in this case, developers of the stockyard argued that the listing of feedlots and livestock sale barns implied that stockyards were a permitted use because they contain livestock. *Id.* at 82. The appeals court rejected that view noting that the ordinance plainly stated that "except as provided no building or premises shall be used for any purpose other than that permitted in the zoning district in which the

building or premises is located." *Id.* The court reasoned that when an ordinance specifies certain uses, those not designated are excluded by implication. *Id.*

Likewise, in the present case, the Zoning Code enumerates a list of permitted uses in the Farm Zone which does not include CAFOs. And like a stockyard, a CAFO is not just another agricultural use simply because it contains livestock. Instead, like a mobile home park, it is a legally distinct category of use "unlike any other." Accordingly, there is no basis for the trial court to have concluded that a CAFO is "clearly" understood to be synonymous with the terms "raising hogs" and "barns" and, therefore, a permitted use in the Farm Zone. At best, the Farm Zone language is ambiguous and subject to interpretation on that question. Because the BZA's resolution of that ambiguity is reasonable, it must be upheld. *McBride,* 579 N.E.2d at 1315.

Nevertheless, in rejecting the BZA's reasonable construction, the trial court relied on the rule of statutory construction that zoning ordinances are to be strictly construed in favor of the property owner. (Opinion at 9; App. II:23) While that is a general rule, such strict construction does not allow courts to add language to an ordinance or resolve ambiguity against a BZA's reasonable interpretation of its own zoning ordinance. *House of Prayer Ministries, Inc. v. Rush Cty. Bd. of Zoning Appeals,* 91 N.E.3d, 1053, 1063-64 (Ind. Ct. App. 2018).

Here, the trial court has done both—its ruling adds legally defined terms, language and meaning to the Farm Zone that does not exist, fails to give deference to the BZA's reasonable interpretation and, therefore, should be overturned by this Court.

2. The Trial Court Impermissibly Reweighed Evidence

It was also reasonable for the BZA to conclude that CAFPs are not allowed in the Farm Zone based on the evidence before it. Instead of assessing that evidence to verify that it supports the BZA's determination, the trial court "identif[ied] the facts relevant to its determination."

(Opinion at 3; App. II:17). That was not the trial court's job. *Midwest Minerals Inc.*, 880 N.E.2d at 1268 (on judicial review of a BZA decision, the court may not "reweigh the evidence or substitute [its] decision for that of the [BZA's]") And, none of the evidence identified by the trial court outweighs the credible evidence relied on by the BZA.

Specifically, the trial court accepted the Lights' argument that CAFOs are permitted uses in Farm Zone because "there were other confined feeding operations permitted in Delaware County following the passage of the zoning ordinance." (Opinion at 8; App. II:22) But that fact says nothing about the relevant question: whether the *initial* drafters of the Zoning Ordinance intended for confined feeding operations or—more importantly, CAFOs—to be permitted uses in the Farm Zone. *Hoosier Outdoor Advertising Corp.,* 844 N.E.2d at 163 (in construing a zoning ordinance, court's "goal is to determine, give effect to, and implement the intent of the *enacting* body." (emphasis added)).

Rather, it simply shows that confined feeding operations were allowed, nothing more. And, the evidence confirms that is exactly what happened. As explained by the Commissioners' attorney, the County's existing confinement operations had simply been "place[d] in areas that are zoned a-agricultural" since "the county did not have zoning regulations concerning confined animal feeding operations." (App. II:32, App. III:98) Notably, in *T.W. Thom Const.,* the appeals court considered and rejected the mobile home park developer's similar argument, explaining that the city's similar "*de facto* custom and practice" of allowing mobile home parks by deferring to state regulation in lieu of local zoning approval, did not mean that mobile home parks are permitted uses under the ordinance. 721 N.E.2d at 326. That is what the trial court should have concluded here.

The trial court also relied on the County's 1997 Subdivision Ordinance language "requiring covenants to acknowledge the possibility of 'confinement feeding operations' adjacent to subdivisions if they were located near the F Farming Zone," as indicating an "understanding" that CAFOs are allowed. (Opinion at 9; App. II:23) But that language says nothing about what the 1973 drafters of the Zoning Ordinance intended, or prove that the 1993 drafters of the Farm Zone intended to include CAFOs as permitted uses. It demonstrates only that the 1997 drafters of the Subdivision Ordinance "understood" that "confinement feeding operations"—not CAFOs—may exist in the Farm Zone.

Similarly, the trial court concluded that the recent Moratorium Ordinance demonstrates the Commissioners' current "understanding" that the Farm Zone "provides that an animal feeding operation of any size is a permitted use." (Opinion at 9; App. II:23) The current Commissioners' "understanding" aside, it is the Farm Zone language that controls in this case, and that language does not "provide" any such thing. Nowhere in the Farm Zone can the legally defined terms "animal feeding operation" or CAFO be found. The exclusion of these legal terms is the best evidence of what the Farm Zone drafters intended. *Bryant v. Indiana State Dep't of Health*, 695 N.E.2d 975, 978 (Ind. Ct. App. 1998) ("[t]he cardinal rule of statutory construction is to ascertain the intent of the drafter by giving effect to the ordinary and plain meaning of the language used"). And that best evidence, along with other evidence in the record, supports the BZA's reasonable determination that the drafters never intended for CAFOs to be permitted uses in the Farm Zone. That decision must be upheld.

VI. CONCLUSION

For all the foregoing reasons, this Court should reverse the trial court's erroneous ruling and reinstate the BZA's decision to revoke the building permit for the Light CAFO.

Respectfully submitted,

/s/ Kim E. Ferraro

Kim E. Ferraro, Atty. No. 27102-64
Aaron Corn, Atty. No. 30570-49
Hoosier Environmental Council
541 S. Lake Street
Gary, Indiana 46403
Phone: 219/464-0104
Email: kferraro@hecweb.org
acorn@hecweb.org

Attorneys for Intervenors-Appellants
STEVEN CHAMBERS
KATHY CHAMBERS
STEPHEN DRISCOLL
ELIZABETH DRISCOLL
PERRY EVANS
TONYA EVANS

APPEALED ORDER

In accordance with Appellate Rule 46(A)(12), a true and correct copy of the trial court's Order issued on May 28, 2019, is attached hereto.

/s/ Kim E. Ferraro
Kim E. Ferraro

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Appellant's Brief contains no more than 14,000 words, excluding items listed in Appellate Rule 44(C).

/s/ Kim E. Ferraro
Kim E. Ferraro

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Appellants' Brief was delivered this 12th day of September, 2019, the following persons, via the Indiana Court's E-Filing System:

Brianna J. Schroeder
Todd J. Janzen
Janzen Agricultural Law LLC
8425 Keystone Crossing
Indianapolis, IN 46240

Benjamin J. Freeman
110 E. Charles Street, #200
Muncie, IN 47305

/s/ Kim E. Ferraro
Kim E. Ferraro