IN THE RUSH SUPERIOR COURT
STATE OF INDIANA

FLAT ROCK WIND, LLC, Petitioner, vs. RUSH COUNTY AREA BOARD OF ZONING APPEALS, Respondent, and, DANIEL SPRINKLE, MELISSA SPRINKLE, J.B. VOGEL, MINDY VOGEL, GORDON HALL, RUTH ANN HALL, JOHN HALL, LINDA HALL, PAUL LEISURE, TERESA LEISURE, STUART LINVILLE, NICHOLE LINVILLE, TIERNEY HALL, MICHELLE HALL, RALPH ADAMS, RENEE ADAMS, JIM WAINWRIGHT, JANICE WAINWRIGHT, CHARLIE STARKE, LINDA STARKE, HENRY CAMPBELL, VICKI CAMPBELL, GARY HOEING, TERRI GRAY, and MICHELLE SPRINKLE, Intervening Respondents.	)	CASE NO. 70D01-1507-PL-000220

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This matter is before the Court on the Verified Petition for Judicial Review filed by the petitioner, Flat Rock Wind, LLC ("Flat Rock"). The Court heard the arguments of counsel on April 13, 2016. The Court, having considered the record of proceedings before the Rush County Area Board of Zoning Appeals ("BZA") and the arguments of counsel, now enters the following findings of fact, conclusions of law and judgment:

I. FINDINGS OF FACT

1. Apex Clean Energy is the parent company of Flat Rock. (BZA R. Vol 1, p. 55)

2. Flat Rock wishes to develop a 180 megawatt commercial Wind Energy Conversion System ("WECS") on over 29,000 acres of land located in Rush and Henry Counties. (BZA R. Vol. 5, p. 1132)

3. The WECS would be located on real estate owned by 88 different property owners. (BZA R. Vol. 1, p. 8)

4. Flat Rock plans to install a total of 95 three megawatt wind turbines with 66 turbines located in Rush County[1]. (BZA R. Vol. 1, p. 181)

5. On March 30, 2015, Flat Rock submitted to the BZA its application for a special exception permit to construct the WECS project. (BZA R. Vol. 1, p. 49)

6. On May 7, 2015, the BZA held a public hearing on Flat Rock's request for a special exception permit. (BZA R. Vol. 1, p. 5)

7. Flat Rock's representatives and a number of other supporters appeared at the hearing to speak in favor of the proposed commercial WECS. Intervening Respondents (collectively "Landowners") along with numerous other Rush County residents, appeared at the hearing to remonstrate against the proposed commercial WECS. (BZA R. Vol 1, pp. 20-31)

8. The BZA's staff and planning consultant prepared a comprehensive report concerning Flat Rock's application. (BZA R. Vol. 1, pp. 138-50)

9. The overall review process was hindered, however, based on the incomplete nature of Flat Rock's application. The BZA's planning consultant noted: "The Special Exception is a little confusing because [Flat Rock is] proposing—they're not quite sure what they want to do yet and that's what makes it a little confusing for me to review and possibly for our Board to review." (BZA R. Vol. 5, p. 1015)

[1] These numbers are somewhat fluid, and Flat Rock indicated that the number of turbines could change prior to the time that it obtains the improvement location permit.

10. Among any other issues with the application, since Flat Rock had yet to determine the size, number, or design of turbines, the BZA's planning consultant acknowledged that "there's still a lot of information that's still in the air" and that there were "so many things that – that we are still not clear on." (BZA R. Vol. 5, p. 1015)

11. The BZA's staff report concluded: "Because of the detailed information involved in this request and the unusual nature of the land use, it is recommended that the BZA continue this request until it has had adequate time to review all of the material." (BZA R. Vol. 1, p. 149; Vol. 5, p. 1043)

12. Before considering the continuation of the hearing, the BZA received testimony and other evidence from remonstrators bearing on the adverse health effects and adverse impact to property values resulting from Flat Rock's proposed commercial WECS. The evidence before the BZA, in part, correlated the degree of harm with proximity of residences to commercial wind turbines. (BZA R. Vol. 1, pp. 5-6; Vol. 4, pp. 707-46; Vol. 5, pp. 1058-59, 1067-68, 1074, 1077, 1082, 1091)

13. Among other authorities bearing on the adverse impacts from the commercial WECS, the evidence before the BZA included a paper authored by two acoustical engineering experts acknowledging that: "Studies already completed and currently in progress describe significant health effects associated with living in the vicinity of industrial grade wind turbines." (BZA R. Vol. 4, pp. 711-20)

14. After addressing the long-term adverse health effects documented to result from residing in proximity to a commercial wind turbine (with reported health effects for some residents experienced as far as two miles from a wind turbine), the experts proposed increasing the distances

between rural residences and the current industrial grade wind turbines in the 1.5 - 3 megawatt range to at least 1 kilometer (equating to approximately 3,280 feet). (BZA R. Vol. 4, p. 719)

15. For purposes of its WECS special exception application before the BZA, Flat Rock specifically assumed the use of the larger three megawatt wind turbine with each having a total height of 610.2 feet. (BZA R. Vol. 1, pp. 52, 56)

16. Consistent with the conclusions of the foregoing experts correlating the degree of harm with proximity of residences to commercial wind turbines, the BZA was, in part, requested to impose, as a condition on any grant of the application, increased setback distances between the turbines and residences of non-participating owners. (BZA R. Vol. 1, p. 6; Vol. 5, pp. 1068, 1072)

17. Agreeing with the staff recommendation and finding that additional time was required to evaluate the application materials and issues, the BZA ultimately continued the public hearing on Flat Rock's WECS special exception application to July 1, 2015. (BZA R. Vol. 1, p. 5; Vol. 5, pp. 1091-93).

18. On June 17, 2015, approximately two weeks prior to the new public hearing, Flat Rock amended its WECS special exception application to, in part, increase the setback distance between the wind turbines and residences of non-participating owners from 1,000 feet to 1,400 feet. (BZA R. Vol. 1, pp. 178-86)

19. On June 24, 2015, Flat Rock submitted to BZA staff a proposed written commitment with respect to the project as contemplated under IC § 36-7-4-1015. (BZA R. Vol. 1, pp. 212; Vol. 2, pp. 362-68)

20. On July 1, 2015, the BZA conducted a lengthy public hearing on Flat Rock's amended WECS special exception application. (BZA R. Vol. 5, pp. 1100-1301)

21. For purposes of the BZA's consideration during the hearing held July 1, 2015, the BZA's staff and planning consultant had again prepared and submitted to the BZA a comprehensive staff report concerning Flat Rock's WECS special exception application. (BZA R. Vol. 1, pp. 211-33)

22. The BZA's staff report addressed the general criteria applicable to all special exceptions under the Rush County Zoning Ordinance ("Zoning Ordinance"), as well as the additional criteria applicable to a commercial WECS. With respect to noise impacts from the commercial WECS on adjoining properties, the BZA's staff report noted in part:

* * *

> The nonprofit Acoustic Ecology Institute in Santa Fe, New Mexico concludes most of the reports to date that have concluded turbines are harmless examined "direct" effects of sound on people and tended to discount "indirect" effects moderated by annoyance, sleep disruption, and associated stress. Research that considered indirect pathways has yielded evidence strongly suggesting the potential for harm.
>
> **Noise Variability** – Turbine noise (the aerodynamic noise produced by air moving around the spinning blades as opposed to any mechanical noise from the motor) is often deemed more annoying than the hum or roar of transportation noise because of its repetitive nature and high variability in both level and quality – from "swoosh" to "thump" to silence, all modulated by wind speed and direction. This pulsing, uneven quality enables the noise to repeatedly capture the attention and become more difficult to ignore.
>
> **Night Noise** – Unlike vehicle traffic, which tends to get quieter after dark, turbines can sound louder overnight. The absolute noise level of the wind farm may be no more than during the day, but it can be 10-20 decibels louder than the quieter nighttime ambient sound levels. This detail has important implications for sleep disruption.
>
> **Noise frequency** – Wind turbines generate lower frequencies of sound than traffic. These lower frequencies tend to be judged as more annoying than higher frequencies and are more likely to travel through walls and windows. Sound frequency lower than 20 Hz – inaudible to the human ear – has been associated in some studies with symptoms including fatigue, sleeplessness, and irritability, as well as changes to the physiology of the inner ear that have poorly understood implications.

> Residents of rural areas where turbines are more common may be people who are naturally more sensitive to noise than the population at large. They may have greater expectations of quiet and be more aware of noise disturbances, amplifying the potential for health effects related to environmental noise.
>
> There will likely be noise impacts on the surrounding area resulting from the proposed commercial WECS.
>
> * * *

(BZA R. Vol 1, p. 214) (emphasis in original)

23. As with the initial public hearing, following Flat Rock's presentation at the July 1, 2015 hearing, the BZA received testimony and other evidence from a large number of remonstrators bearing on the adverse health effects and adverse impact to property values resulting from the commercial WECS. (*See, e.g.,* BZA R. Vol. 4, pp. 747-844; Vol. 5., pp. 1219-20, 1224-35, 1247-49, 1260-61)

24. Consistent with information conveyed in the BZA's staff report and addressed during its planning consultant's presentation, the BZA received evidence that included an acoustical engineering expert's published report addressing the peculiar infrasound and low frequency noises generated by commercial wind turbines and resulting long-term adverse health effects to those residing in proximity to such large turbines. (BZA R. Vol. 4, pp. 749-68)

25. From a basic safety standpoint, the BZA also received evidence addressing the hazards associated with ice and blade throw from the large-scale wind turbines if constructed as proposed by Flat Rock. (*See, e.g.*, BZA R. Vol. 4, pp. 779-93, 1224-25)

26. Further supporting the health and safety aspects of adequate distance between the large-scale commercial turbines and residences, one remonstrator noted a turbine manufacturer's recommended setback distance as 6,562 feet. (BZA R. Vol. 5, p. 1247)

27. The specific property value impact was further addressed: "The wind results are also broadly consistent with intuition. At the block-group level, the existence of turbines between up to 1 and 3 miles away negatively impacts property values by between 15.6% and 31%, while having at least one turbine on the parcel reduces prices by 65%." (BZA R. Vol. 4, p. 815; *see also* Vol. 4, pp. 737-38)

28. Following the public comment period, BZA Member Joe Rathz moved to approve the WECS special exception "as presented" with the conditions and commitment "that have been provided to us." The motion failed for lack of a second. (BZA R. Vol 5, p. 1292)

29. BZA Member Steve Cain thereafter moved to approve the WECS special exception with the condition that the setback distance be increased to 2,640 feet from any property line. That motion likewise failed for lack of a second. (BZA R. Vol 5, p. 1292)

30. Expressing concerns over the proximity of the large wind turbines to resident properties, and with Mr. Cain's preceding motion failing for lack of a second, BZA Member Larry Copley then moved to approve the WECS special exception with the condition that the setback distance be increased to 2,300 feet (may be hereinafter referred to as the "Setback Condition"). (BZA R. Vol. 5, p. 1292)

31. BZA Member Copley's motion was thereafter clarified to reflect that the 2,300 feet applied to the setback distance between the wind turbines and properties of non-participating owners, with the special exception subject to the remaining conditions and written commitment addressed in the staff report recommendations. (BZA R. Vol 5, p. 1293-96)

32. BZA Member Copley's motion passed by a majority vote of the BZA members. (BZA R. Vol 5, p. 1297)

33. Implicit in the BZA's decision is that, but for the imposition of the condition increasing the setback distance to 2,300 feet, the commercial WECS special exception failed to satisfy the Zoning Ordinance. In particular, absent the Setback Condition, Flat Rock's WECS special exception would at minimum adversely affect the public interest, not be in harmony with the purpose and intent of the Zoning Ordinance, fail to adequately address the economic and noise effects on adjoining properties generally in the district, and not be generally compatible with adjacent and other properties in the district. This position is further consistent with the BZA's written Findings of Fact subsequently approved on September 3, 2015. The BZA's Findings of Fact contain references to multiple special exception criteria being satisfied only after factoring in the Setback Condition (in addition to other conditions and restrictions imposed as part of the decision). (BZA finding that 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 granting of this special exception, with the additional conditions and restrictions placed on the project by the BZA, will not adversely affect the public interest."); ("The project meets the standards of the Zoning Ordinance, with the submission of the Written Commitment and the conditions listed below, including the increased turbine setback from non-participating property boundaries. As a result, the BZA finds that the WECS project with such conditions is compatible."); (BZA finding that Flat Rock's proposed setback distance from non-participating owners of 1,400 feet is not "adequate to protect public health and safety." "In order to greater protect health and safety, the BZA imposes a greater minimum setback for non-participating properties of 2,300 feet, as measured from the center of the WECS turbine to the property line of the non-participating property owner's land."); ("[T]he Board finds that an additional setback is necessary to protect health and safety on non-participating properties and owners, and imposes as

a condition on the grant of the special exception a minimum setback of 2,300 feet, to be measured from the center of the WECS turbine to the non-participating property line.")

34. On July 22, 2015, Flat Rock filed its Verified Petition for Judicial Review seeking judicial review of the BZA's July 1, 2015 zoning decision. At the time of filing of Flat Rock's Verified Petition for Judicial Review, the BZA had not yet issued it written Findings of Fact. As such, Flat Rock "expressly reserve[d] the right to amend this Verified Petition once the BZA's written findings are issued."

35. Since the September 3, 2015 approval of the BZA's written Findings of Fact, Flat Rock has not sought leave of Court to amend its Verified Petition for Judicial Review and assert any specific challenge to the BZA's written Findings of Fact and any underlying evidence contained in the record supporting such Findings of Fact.

II. CONCLUSIONS OF LAW

36. This Court has jurisdiction of the parties.

37. This Court has jurisdiction over the subject matter of the litigation.

38. Any finding of fact which is actually a conclusion of law shall be deemed to be a conclusion of law.

39. Any conclusion of law which is actually a finding of fact shall be deemed to be a finding of fact.

40. Flat Rock challenges the BZA's decision granting its amended commercial WECS special exception application with the imposition of numerous conditions, including the Setback Condition.

41. The Zoning Ordinance governs the development and construction of the WECS project.

42. The preface to the Zoning Ordinance notes: "The general trend in zoning has been 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. This is the basic aim of zoning in general, and this ordinance in particular."

43. In the recitals found on page five of the Zoning Ordinance, it is stated that the general purpose of the Zoning Ordinance as a whole includes the preservation of property values and promotion of the public health, safety, comfort, convenience and general welfare.

44. The Zoning Ordinance delegates to the BZA the exclusive power and duty to hear and decide applications for special exceptions. Zoning Ordinance, Sec. 10.

45. Beyond delegating to the BZA the exclusive power and duty to hear and decide applications for special exceptions, the Zoning Ordinance delegates to the BZA the authority to interpret and enforce its terms and to impose conditions as part of any decision granting a special exception. Zoning Ordinance, Sec. 10 and 12. *See also* IC § 36-7-4-918.2 (providing that a zoning board, in granting any special exception, "may impose reasonable conditions as part of its approval").

46. Before the BZA, the burden of demonstrating satisfaction of the relevant criteria for the commercial WECS special exception solely rested with Flat Rock as the applicant. *See Crooked Creek Conservation and Gun Club v. Hamilton*, 677 N.E.2d 544, 548 (Ind. Ct. App. 1997). Landowners and other remonstrators, as well as the BZA, were not required to negate Flat Rock's case. *Id.* "Since remonstrators need not affirmatively disprove an applicant's case, a board of zoning appeals may deny an application for a special exception on the grounds that an applicant has failed to carry its burden of proving compliance with the relevant statutory criteria." *Id.*

47. As an administrative agency with expertise in zoning matters, the BZA's decision is presumed to be correct. *See Midwest Minerals, Inc. v. Bd. of Zoning Appeals of the Area Plan*

Dept./Comm'n of Vigo Cnty., 880 N.E.2d 1264, 1268 (Ind. Ct. App. 2008). The proceeding on judicial review is not intended to be a trial *de novo*, and it is well established that a reviewing court may not reweigh the evidence, reassess the credibility of witnesses or otherwise substitute its judgment for that of the zoning board; rather, a reviewing court must accept the facts as found by the zoning board. *See id.*; *Crooked Creek*, 677 N.E.2d at 548. The BZA's decision should not be reversed unless there is a clear showing of an abuse of discretion, lack of substantial evidence to support the decision, or an error of law in the decision. *Boffo v. Boone Cnty. Bd. of Zoning Appeals*, 421 N.E.2d 1119, 1125 (Ind. Ct. App. 1981). Flat Rock bears the burden of demonstrating the invalidity of the BZA's decision. *See* IC § 36-7-4-1614.

48. Before this Court, Flat Rock has principally argued that the BZA lacked authority to impose the Setback Condition as part of the grant of the special exception. This argument requires the interpretation of the Zoning Ordinance and applicable statutes and thus presents a question of law subject to the following principles set forth in *Hoosier Outdoor Advertising Corp. v. RBL Mgt., Inc.*:

> Generally, we review questions of law decided by an agency *de novo*. *Huffman v. Office of Envtl. Adjudication*, 811 N.E.2d 806, 809 (Ind. 2004). However, an agency's construction of its own ordinance is entitled to deference. *See Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n*, 819 N.E.2d 55, 66 (Ind. 2004). The ordinary rules of statutory construction apply in interpreting the language of a zoning ordinance. *Id.* at 65. Under those rules, the express language of the ordinance controls our interpretation and our goal is to determine, give effect to, and implement the intent of the enacting body. *See Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003). 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. *See id.* If a court is faced with two reasonable interpretations of an ordinance, one of which is supplied by an administrative agency charged with enforcing the ordinance, the court should defer to the agency. *See id.* Once a court determines that an administrative agency's interpretation is reasonable, it should end its analysis and not address the reasonableness of the other party's interpretation. *Id.* at 1076–77. Terminating the analysis reinforces the policies of acknowledging the expertise of agencies

> empowered to interpret and enforce ordinances and increasing public reliance on agency interpretations. *Id.* at 1077.

844 N.E.2d 157, 163 (Ind. Ct. App. 2006).

49. In order to carry out the spirit and purpose of the statute or ordinance, words and phrases in a single section are construed together with the other parts of the same section and with the statute or ordinance as a whole. *See.Dreiling v. Custom Builders*, 756 N.E.2d 1087, 1089 (Ind. Ct. App. 2001). "Undefined words in a statute or ordinance are given their plain, ordinary and usual meaning." *600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion Cnty.*, 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.* The legislative intent as ascertained from the whole prevails over the strict or literal meaning of any word or term used in the statute or ordinance. *Noble Cnty. Bd. of Comm'rs v. Fahlsing*, 714 N.E.2d 1134, 1136 (Ind. Ct. App. 1999).

50. "In their interpretation and application, the provisions of [the Zoning Ordinance] shall be held to be minimum requirements, adopted for the promotion of the public health, safety or general welfare." Zoning Ordinance, Sec. 15.

51. With respect to Flat Rock's application in particular, the BZA was broadly and flexibly authorized, among other duties, "to decide such questions as are involved in determining whether special exceptions should be granted" and "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." Zoning Ordinance, Sec. 10.2 (emphasis added). *See also* Zoning Ordinance, Sec. 5.1.46 (noting part of the definition of "Special Exception" as follows: "**Restrictions imposed by the [BZA] in addition to** those for the Permitted Uses of the districts **are required to be met.**") (emphasis added).

52. In granting a special exception, the Zoning Ordinance separately provides for the BZA to make written findings certifying compliance with all applicable district restrictions "as well as such **additional restrictions which the [BZA] may see fit to impose.**" Zoning Ordinance, Sec. 10.2(e) (emphasis added).

53. An applicant for a commercial WECS special exception bears the burden of satisfying both Section 10.2 of the Zoning Ordinance setting forth the general criteria applicable to all special exceptions and Section 6.4 of the Zoning Ordinance pertaining specifically to WECS. Section 10.2 requires the BZA, in part, to find that Flat Rock's WECS special exception "will not adversely affect the public interest" and that "satisfactory provision and arrangement has been made concerning" matters such as the economic and noise effects on adjoining properties generally in the district, screening and buffering of "objectionable or unsafe" views, noises or vibrations, and the "[g]eneral compatibility with adjacent properties and other property in the district."

54. The Court concludes that the Zoning Ordinance in this case confers upon the BZA a significant amount of discretion. *See Midwest Materials,* 880 N.E.2d at 1268. Among the multiple requirements set forth under Section 10.2 of the Zoning Ordinance, the BZA in granting Flat Rock's amended application was required to find that the commercial WECS "will not adversely affect the public interest" and that "satisfactory provision and arrangement has been made concerning" matters such as the economic and noise effects on adjoining properties generally in the district, screening or buffering "objectionable or unsafe" views, noises or vibrations, and the "[g]eneral compatibility with adjacent properties and other property in the district." "[W]hen the zoning ordinance provides the board of zoning appeals with a discernable amount of discretion, the board is entitled, and may even be required by the ordinance, to exercise its discretion." *Id.* (citing *Crooked Creek,* 677 N.E.2d at 547-48).

55. Before this Court, Flat Rock has argued that the BZA possesses no authority to impose, as a condition of approval of the commercial WECS special exception, a setback in excess of the minimum described in Section 6.4.6.4.1 of the Zoning Ordinance. Section 6.4.6.4.1 of the Zoning Ordinance is entitled "**Minimum setback distances for Commercial WECS (Wind Energy Conversion Systems).**" (emphasis in original). That section describes the "Minimum Setback Distance" as 1,000 feet for non-participating landowners. *Id.*

56. The term "setback" is not defined in the Zoning Ordinance as relating to distances between structures or a structure and a private property line; rather, "Setback" is solely defined in Section 5.1.41 of the Zoning Ordinance as being "[t]he shortest distance measured at right angles to a public right-of-way which separates a structure from said public right-of-way."

57. Section 12 of the Zoning Ordinance invests the BZA with the ultimate responsibility at the administrative level to interpret and enforce the Zoning Ordinance, and its interpretation is entitled to great weight and deference by this Court. *See Hoosier Outdoor*, 844 N.E.2d at 163 (addressing the deference to be given to an agency's construction of its ordinance).

58. The BZA had the opportunity to carefully consider the purpose and intent of the Zoning Ordinance and all of the applicable provisions concerning the commercial WECS special exception. Through a majority vote of its members, the BZA interpreted the "Minimum Setback Distance" set forth in Section 6.4.6.4.1 of the Zoning Ordinance as the "minimum" and subject to being increased based on the particular record before it as a condition to granting Flat Rock's commercial WECS special exception. The BZA did not err in construing its Zoning Ordinance in such a manner. Indeed, the BZA's foregoing interpretation of the Zoning Ordinance is consistent with the rationale employed by the Indiana Supreme Court in *Fulton Cnty. Advisory Plan Comm'n v. Groninger*, 810 N.E.2d 704 (Ind. 2004).

59. In *Groninger*, the developers applied for primary plat approval from the plan commission. 810 N.E.2d at 705. As with Flat Rock's arguments before this Court concerning the "minimum" setback standards, the developers in *Groninger* contended that approval of the application was mandatory since they satisfied the "minimum" vision clearance standards specifically described in the zoning ordinance. *Id.* at 708. In construing the term "minimum" used in the zoning ordinance, the Indiana Supreme Court rejected the developers' position as follows:

> Subsections (a) and (b) do not, contrary to the [developers'] argument, set forth fixed and immutable standards. Rather, they set forth *minimum* standards -- the Plan Commission will not approve an application that does not meet these minimums. But the import of the use of the word "minimum" in both subsections (a) and (b) is that 225 feet or 175 feet may well not be enough if visibility is nevertheless impaired because of the grade or shape of the road, foliage considerations, and the like. Because the plain language of subsections (a) and (b) -- again, the use of the word "minimum" -- puts a reader on notice that more may very well be required in order to receive approval for an entrance, the [developers] are incorrect in asserting that their plat was entitled to be approved simply because it met the 225/175 feet benchmarks.

Id. (emphasis in original).

60. Before this Court, Flat Rock cites to *Porter Cnty. Bd. of Zoning Appeals v. SBA Towers II*, 927 N.E.2d 915 (Ind. Ct. App. 2010), for the proposition that the BZA possessed no discretion to impose, as a condition to approval of the commercial WECS special exception, a setback distance greater than the 1,000-foot "Minimum Setback Distance" stated in the Zoning Ordinance. *See* Flat Rock Reply Brief, p. 7. The Court finds *SBA Towers II* to be distinguishable from this case. *SBA Towers II* involved the approval of a special exception for a wireless communications tower and such towers are subject to the federal Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* ("TCA"). In reversing the zoning board's denial of the special exception for the tower, the court of appeals in *SBA Towers II* evaluated the evidence supporting the zoning board's denial and determined that it related entirely to matters, such as environmental

or health effects, expressly prohibited from consideration under the federal TCA and case law construing it. *See id.* at 923-24. The BZA in this case was not similarly prohibited from considering any adverse health or environmental effects from the commercial WECS in reaching a decision on Flat Rock's application. Moreover, as previously addressed, the BZA's interpretation of the "minimum" setback distance in the Zoning Ordinance is consistent with the rationale employed by the Indiana Supreme Court in *Groninger*, 810 N.E.2d at 708.

61. The BZA's approved Findings of Fact further supported the imposition of the Setback Condition, along with numerous other conditions, in approving the WECS special exception. The BZA found that the Setback Condition was "justified to protect health and safety" and authorized pursuant to Section 10.2(e) of the Zoning Ordinance. That section of the Zoning Ordinance authorizes the BZA to impose "such additional restrictions which the [BZA] may see fit to impose." *See also* Zoning Ordinance, Sec. 10 (separately authorizing the BZA to grant special exceptions "with such conditions and safeguards as are appropriate under this ordinance.").

62. The BZA, in its approved Findings of Fact, also expressly found that Flat Rock's own proposed increased setback distance of 1,400 feet was "not adequate to protect public health and safety." Indeed, the BZA specifically found the Setback Condition to be "necessary to protect health and safety on non-participating properties and owners."

63. Based upon the record and applicable law, the Court concludes that the BZA in this case properly acted within its broad authority and discretion in imposing the Setback Condition, along with numerous other conditions and restrictions, as part of the decision granting Flat Rock's amended commercial WECS special exception application.

64. The Court further separately and alternatively concludes that the Setback Condition resulted in no prejudice to Flat Rock and it is thus not entitled to any relief on judicial review. *See*

IC § 36-7-4-1614(d) (person seeking judicial relief must establish prejudice, in addition to one of the statutory grounds set forth therein); IC § 36-7-4-1615 (Court must find person "has been prejudiced under section 1614" in order to set aside a zoning decision). Any claim by Flat Rock of prejudice in this case is entirely, and erroneously, premised on the position that, absent the Setback Condition, it satisfied all of the applicable criteria under the Zoning Ordinance and the BZA was required to grant the commercial WECS special exception. *See, e.g.*, Petition for Judicial Review, p. 4 ("Petitioner satisfied all of the provisions of Section 6.4 and Section 10.2 of the Zoning Ordinance. Once Petitioner met the regulatory criteria in the Zoning Ordinance, the BZA was required to grant the WECS Special Exception to Petitioner. . . ."). In this case, as previously addressed, the BZA effectively determined that, but for the Setback Condition, the commercial WECS special exception as proposed by Flat Rock failed to satisfy multiple criteria under the Zoning Ordinance.

65. Flat Rock separately contends before this Court that the Setback Condition "is completely unsupported by any evidence in the BZA Record." *See* Flat Rock Br., p. 21. In this regard, under the applicable standard, "a reviewing court, whether at the trial or appellate level, is limited to determining whether the zoning board's decision was based on substantial evidence." *Crooked Creek*, 677 N.E.2d at 547. "When determining whether an administrative decision is supported by substantial evidence, the reviewing court must determine from the entire record whether the agency's decision lacks a reasonably sound evidentiary basis." *Id.* at 548. "[E]vidence will be considered substantial if it is more than a scintilla and less than a preponderance." *Id.*

66. Based upon the record, and within the applicable standard of review, the Court concludes that the Setback Condition was supported by substantial evidence in the record. The evidence received by the BZA supported setback distances of at least 2,300 feet from a non-

participating owner's property line for reasons of both health and preservation of property values. (*See, e.g.*, BZA R. Vol. 1, pp. 6, 26; Vol. 4, pp. 714; 719; 725; 734; 740; 742-43). While the BZA had before it various conflicting evidence, a reviewing court does not "reweigh the evidence or reassess the credibility of witnesses; rather, the reviewing court must accept the facts as found by the zoning board." *See Crooked Creek*, 677 N.E.2d at 548.

67. The Court further concludes that the Setback Condition does not constitute an illegal *de facto* moratorium as had been argued by Flat Rock. The sole authority cited by Flat Rock for its illegal *de facto* moratorium argument, *Pro-Eco, Inc. v. Bd. of Com'rs of Jay Cnty., Ind.*, 956 F.2d 635 (7th Cir. 1992), is distinguishable from this case. Unlike in *Pro-Eco*, this case involves neither an ordinance purporting to establish a blanket prohibition on WECS in Rush County nor a declaratory action against the Rush County Commissioners challenging the same. Moreover, *Pro-Eco* did not involve any purported "*de facto* moratorium" arising from a zoning board's decision. The BZA imposed the Setback Condition, along with numerous other conditions, as part of granting Flat Rock's request for a special exception over Landowners' objections. While Flat Rock argues that the Setback Condition would purportedly "kill the project," the sole basis for this position is the unsupported statement of its representative, injected after the BZA had closed the hearing to public comments. In any event, to the extent that the Setback Condition (or any other condition imposed as part of the decision granting the special exception) potentially renders Flat Rock's project less profitable, such a consequence falls well short of "banning" the project or a "*de facto* moratorium."

68. The Court finally concludes that Flat Rock failed to meet its burden of establishing any constitutional due process violation in connection with the procedures leading to the BZA's grant of the amended commercial WECS special exception application. Proceedings before

administrative agencies, including zoning boards, are not required to be conducted with all of the procedural safeguards afforded by judicial proceedings. *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65, 68 (1974). *See also City of Hobart Common Council v. Behavioral Inst. of Ind.*, 785 N.E.2d 238, 247 (Ind. Ct. App. 2003). The Indiana Supreme Court has acknowledged that it "accept[s] a lower standard before quasi-judicial bodies because it would be unworkable to do otherwise." *Mishawaka*, 310 N.E.2d at 68. A zoning board satisfies the constitutional standards so long as its procedures leading to the hearing's outcome "are orderly, impartial, judicious and fundamentally fair." *See McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Comm'n*, 579 N.E.2d 1312, 1315 (Ind. Ct. App. 1991). Based upon the record, the BZA satisfied the foregoing constitutional standards in connection with the procedures leading to its decision on Flat Rock's commercial WECS application.

III. JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Court now affirms the BZA's July 1, 2015 decision granting Flat Rock's Amended WECS Special Exception application, with the Setback Condition and other conditions, restrictions, and written commitments provided for therein. There is no just reason for delay. This is a final, appealable order.

SO ORDERED this 27th day of May, 2016.

Matthew D. Bailey
Special Judge, Rush Superior Court

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