

court requires competent evidence of the value of the assets and liabilities divided by the parties, doesn't that undermine the settlement and subject the parties to the expenses that they were trying to avoid by their agreement?

[6] We hold that, *in the absence of an agreement of the parties to the contrary*, where the parties divide between themselves a part of the marital estate and leave the division of the balance to the discretion of the trial court, the trial court should assume that the property that the parties have already divided was divided justly and reasonably and shall divide the remainder of the assets and liabilities of the parties as if they were the entirety of the marital estate. Thus, it should first determine if the fifty/fifty presumption should be applied. If so, it should divide the remainder of the assets and liabilities equally. If the presumption is not to be applied, the court should apply the statutory factors to determine the percentage that each party should receive and divide the remainder accordingly. By doing so, the parties will maximize the value of their settlement and the trial court will have a basis for its property division that conforms to the statute.

[7,8] Here, the Wife's student loans were marital obligations. The trial court erred by assigning the Wife's student loans on the basis that Wife has the degree and she should now pay for it. While tying debts to respective assets may be appropriate in some property divisions (as where a trial court assigns the marital real estate to one party subject to the mortgage liability thereon), a degree is not an asset.² See *Roberts v. Roberts*, 670 N.E.2d 72, 76-77 (Ind.Ct.App.1996), *trans. denied*; *Prenatt v. Stevens*, 598 N.E.2d 616, 620 (Ind.Ct.App.1992), *trans. denied*; see also

² This is not to say that a trial court may not give due consideration to the effect that the degree may have in determining the earnings

In re Marriage of McManama, 272 Ind. 483, 399 N.E.2d 371, 372 (1980).

Accordingly, we vacate the trial court's entry as to Wife's student loans and remand with instructions to divide the loans in accordance with this decision. We instruct the trial court to determine whether the fifty/fifty presumption should be applied or whether another division is reasonable and then to divide Wife's student debt between the parties in accordance with that division.

Reversed and remanded with instructions.

RILEY, J., and MAY, J., concur.



Robert SEXTON, Melinda Sexton, Stephanie Flinn, Craig Flinn, David Helt, Gail Helt, Jerry Marsh, Hazel Marsh, Steve Bowman, and Celeste Bowman, Appellants-Petitioners,

v.

JACKSON COUNTY BOARD OF ZONING APPEALS and Jerry D. Otte, Thomas Bryant, Ken Turner, Gene Speaker, and Francis Elliot, in their capacity as members of The Jackson County Board of Zoning Appeals, Appellees-Respondents,

and,

Talara Lykins, Intervenor-Appellee.

No. 36A01-0706-CV-258.

Court of Appeals of Indiana.

April 18, 2008.

Background: Neighbors filed petition for writ of certiorari after property owner was

ability of the party holding the degree. See IC 31-15-7-5(5).

granted special exception to build and operate a concentrated animal feeding operation (CAFO). The Jackson Circuit Court, William E. Vance, J., denied petition. Neighbors appealed.

Holdings: The Court of Appeals, Barnes, J., held that:

- (1) neighbors had standing to petition for a writ of certiorari, and
- (2) trial court should have considered supplemental evidence in determining that no violation of Indiana Open Door Law (IODL) occurred.

Reversed and remanded.

1. Administrative Law and Procedure ⊕741

A court reviewing an agency action may provide relief only if the action 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. West's A.I.C. 4-21.5-5-14.

2. Administrative Law and Procedure ⊕760, 784.1

In reviewing an administrative decision, an appellate court does not try the facts de novo or substitute its own judgment for that of the agency. West's A.I.C. 4-21.5-5-11.

3. Appeal and Error ⊕893(1)

On appeal, to the extent the trial court's factual findings were based on a paper record, an appellate court conducts its own de novo review of the record.

4. Zoning and Planning ⊕571

A person must be aggrieved by decision of board of zoning appeals in order to

have standing to seek judicial review of that decision. West's A.I.C. 36-7-4-1003(a).

5. Zoning and Planning ⊕571

To be sufficiently aggrieved by decision of board of zoning appeals to have standing to seek judicial review of that decision, a petitioner must experience substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. West's A.I.C. 36-7-4-1003(a).

6. Zoning and Planning ⊕571

In order to have standing to seek judicial review of decision of board of zoning appeals, that decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal, and the petitioner's resulting injury must be pecuniary in nature. West's A.I.C. 36-7-4-1003(a).

7. Zoning and Planning ⊕571

Evidence showing that neighbors would suffer a pecuniary loss by granting of property owner's permit to build and operate a concentrated animal feeding operation (CAFO) was sufficient to show that they were "aggrieved," as would establish that they had standing to petition for a writ of certiorari; neighbors presented evidence showing that value of their property would decrease if CAFO was constructed.

8. Zoning and Planning ⊕641

Trial court should have considered supplemental evidence in determining that no violation of Indiana Open Door Law (IODL) occurred, in proceeding in which property owner was granted special exception to build and operate concentrated animal feeding operation (CAFO); neighbors alleged that four members of county board of zoning appeals "deliberated, in whispering tones out of earshot of the public and their recording equipment" during hear-

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ing, at issue was conduct of board members during hearing, and neighbors sought to supplement record with videotape of hearing, advisory opinion, and letter notifying board member that his appointment had been revoked. West's A.I.C. 5-14-15-3(a), 36-7-4-1009.

9. Zoning and Planning ⇐641

When reviewing action of zoning board of appeals, the trial court may permit additional evidence so long as it confines such evidence to subjects covered in the hearing before the zoning board.

Peter Campbell King, Tamara B. Wilson, Cline King & King, P.C., Columbus, IN, Attorneys for Appellant.

Joseph A. Miller, Tally Lykins, Seymour, IN, Attorneys for Appellee, Talara Lykins.

John F. Rothring Seymour, IN, Attorney for Appellee, Jackson County Board of Zoning Appeals.

OPINION

BARNES, Judge.

Case Summary

Robert and Melinda Sexton, Stephanie and Craig Flinn, David and Gail Helt, Jerry and Hazel Marsh, and Steve and Celeste Bowman (collectively "the Appellants") appeal the trial court's decision denying their petition for writ of certiorari. We reverse and remand.

We do not address the Appellants' stated issue regarding their amended petition for writ of certiorari as they do not develop the argument in their brief and appear to concede

Issues¹

The Appellants raise several issues. We address the following two dispositive issues:

- I. whether the trial court properly determined that the Appellants did not have standing to petition for the writ of certiorari; and
- II. whether the trial court abused its discretion in determining that no violation of the Indiana Open Door Law ("IODL") occurred.

Facts

On July 18, 2005, Talara Lykins applied to the Jackson County Board of Zoning Appeals ("BZA") for a special exception to build and operate a concentrated animal feeding operation ("CAFO"). Lykins requested approval to house 8,000 hogs on her ten-acre parcel. On October 11, 2005, the BZA held a hearing on her application in a school gymnasium to accommodate a large crowd. Lykins presented evidence in support of her application and several neighbors, including the Appellants, made statements in opposition to the application. The Appellants explained that they lived near the site of the proposed CAFO, ranging from 1200 feet away to a half a mile away.

Although one of the BZA members requested time to review the evidentiary material they had received from Lykins, the other members moved to vote on the application at that time. The vote resulted in a two to two tie. After the tie vote, in front of the crowd, the four BZA members then began talking. The BZA members' twenty-two minute conversation was not recorded. The BZA held another vote and

that its inclusion in the statement of issues and summary of the argument was an oversight. See Appellants' Reply Br. p. 16.

Lykins's application was approved by a vote of three to one.

On November 9, 2005, the Appellants petitioned for a writ of certiorari and on November 18, 2005, they filed an amended petition for a writ of certiorari. On July 10, 2006, the trial court issued a writ of certiorari as to the original petition and struck the amended petition.

On November 27, 2006, the Appellants moved to supplement the record with a video of the October 11, 2005 BZA hearing, an advisory opinion from the Indiana Public Access Counselor, and a letter from the Jackson County Council notifying a BZA member that his appointment to the BZA had been revoked. On December 15, 2006, the trial court granted the motion to supplement the record. On December 21, 2006, Lykins, as intervenor, filed a motion for the trial court to reconsider its permission for the Appellants to supplement the record. The trial court granted Lykins's motion and struck the Appellants' supplemental record.

On May 9, 2007, the trial court denied the petition for writ of certiorari because the Appellants lacked standing. The trial court also concluded that the BZA did not

2. Lykins and the BZA argue that the Appellants' failure to name Lykins in the writ deprived the trial court of subject matter jurisdiction. She argues the notice she received from the Appellants as an adverse party was not sufficient. We disagree. Indiana Code Section 36-7-4-1005 provides in part:

(a) On filing a petition for a writ of certiorari with the clerk of the court, the petitioner for the writ of certiorari shall give notice of the petition as follows:

* * * * *

(2) If the petitioner is not the applicant for the use, special exception, or variance and is a person aggrieved by the decision of a board of zoning appeals as set forth in section 1003 of this chapter, the petitioner shall have a notice served by the sheriff of the county on:

violate the IODL. The Appellants now appeal.

Analysis

I. Standing²

[1-3] The Appellants contend the trial court improperly denied their petition for writ of certiorari. Pursuant to Indiana Code Section 4-21.5-5-14, a court reviewing an agency action may provide relief only if the action 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. *Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n*, 758 N.E.2d 34, 36 (Ind.2001). In reviewing an administrative decision, we do not try the facts de novo or substitute our own judgment for that of the agency. *Id.* at 37 (citing Ind. Code § 4-21.5-5-11). "This statutory standard mirrors the standard long followed by this Court." *Id.* "On appeal, to the extent the trial court's factual findings were based on

(A) each applicant or petitioner for the use, special exception, or variance; and

(B) each owner of the property that is the subject of the application or petition for the use, special exception, or variance.

* * * * *

(d) An adverse party who is entitled to notice of a petition for writ of certiorari under subsection (a) is not required to be named as a party to the petition for writ of certiorari (Emphasis added). There is no argument that the Appellants failed to notify Lykins as required by Indiana Code Section 36-7-4-1005. We will not impose additional filing requirements where the legislature has expressly declined to do so.

a paper record, this Court conducts its own de novo review of the record." *Id.*

[4-6] At issue is whether the Appellants have standing to challenge the BZA's decision. "A person must be 'aggrieved' by a board of zoning appeals's decision in order to have standing to seek judicial review of that decision." *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind.2000) (citing I.C. § 36-7-4-1003(a)). To be aggrieved, the Appellants must experience a substantial grievance, a denial of some personal or property right, or the imposition of a burden or obligation. *See id.* Generally, the BZA's decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner's resulting injury must be pecuniary in nature. *Id.* The Appellants must show some special injury other than that sustained by the community as a whole. *See id.*

The parties cite to *Bagnall* in an effort to show that the Appellants do or do not have standing. In that case, three fifty-foot lots separated the property that was granted a variance by the BZA and the property owned by the Bagnalls. *Id.* Our supreme court concluded that the Bagnalls did not demonstrate that they had standing because they presented nothing in their petition nor did they enter any evidence in the record to suggest that the variance would result in an infringement of a legal right resulting in pecuniary injury or a special injury beyond that sustained by the entire community as required. *Id.*

[7] We conclude that the facts in *Bagnall* are of little guidance here because the potential harm is considerably different from that in *Bagnall* even though the distance between the Appellants' properties and Lykins's is significantly more than the 150 feet at issue in *Bagnall*. The Bagnalls objected to the granting of a setback variance for property three lots away from

theirs. Here, the issue is the operation of an 8,000 hog CAFO—the odors associated with such an operation alone presents a much different set of facts than the setback variance.

More important, however, is that unlike the Bagnalls, the Appellants presented evidence that they would suffer a pecuniary loss if Lykins's application was granted. At the BZA hearing, Richard Brackemeyer testified that he was the township assessor for the past twelve years and that he had looked at every parcel in the township. Brackemeyer testified:

The first thing that has to happen if this hog operation goes in, is the neighborhood value will have to be lowered from a good to a fair or a poor. . . . [T]here's some houses like Flynns [sic], Bowmans and Jerry Marsh's, David Helt's there's some of them that the Sexton's house, there's two of them there that are pretty new houses, Steve Bowman's sister just built a new house up there. I wouldn't be surprised if they wouldn't drop 30 percent, I don't think it would be out of the question. So the property values will decrease in this area.

App. pp. 853-54. Unlike in *Bagnall*, where the allegedly aggrieved party presented no evidence of harm, the Appellants have presented evidence showing that the value of their property will decrease if the CAFO is constructed.

Lykins argues that she presented "factual information" of home sales near similarly situated CAFO's. Appellees' Br. p. 20. Lykins cites her attorney's argument at the October 11, 2005 hearing in which he stated:

I have checked, there has not been a study done any place in the Nation on the affect on housing values. . . . What I did include though are, these are homes here around existing facilities similar to

this, it shows what they, the asking price and what they actually sold for. That kind of gives you an idea the affect these facilities have on a house, which is, as you can see by the listing prices and the sold price, had virtually no affect.

App. pp. 763-64. This statement, taken at face value, only establishes that the properties to which counsel refers sold for the asking price; it does not establish that the property values did not decrease prior to their listing. Moreover, this statement does not address the value of Appellants' properties, which is essential in determining whether the Appellants have standing based on a specific pecuniary injury that they will suffer.

We conclude that the proximity of the Appellants' properties to the alleged harm is not dispositive in determining whether they have standing. The Appellants presented evidence showing that they will suffer a pecuniary loss by the granting of Lykins's permit. This is sufficient to show that they are "aggrieved" and therefore sufficient to establish that they have standing to petition for a writ of certiorari. The trial court's findings and conclusions to the contrary are clearly erroneous.

Although the trial court concluded that the Appellants did not have standing, it appears to have analyzed whether there is sufficient evidence to support the BZA's approval of Lykins's application and concluded that there was sufficient evidence to support the BZA's decision. This analysis, however, did not address all of the

3. Although the parties refer in great detail to the specifics of the proposed supplemental evidence and the Appellants included it in their appendices, because it is not a part of the trial court's record, it is not available for our consideration regarding the merits of the Appellants' IODL claim. See *AKJ Industries, Inc. v. Mercantile Nat. Bank*, 779 N.E.2d 543, 545 (Ind.Ct.App.2002) ("Once evidence is stricken from the record, it may not be used

Appellants' claims. Based on our conclusion today, we remand for consideration or reconsideration as the case may be of the claims in the Appellants' petition for writ of certiorari in light of the fact that they have standing to pursue the claims.

II. Indiana Open Door Law³

[8] The Appellants also argue that the trial court improperly failed to consider supplemental evidence relating to its IODL claim. Specifically, during the October 11, 2005 BZA hearing, approximately twenty-two minutes are not included in the transcript after the first vote but before the second vote. The Appellants allege that during this time, the four BZA members "deliberated, in whispering tones out of earshot of the public and their recording equipment." Appellants' Br. p. 24. In their petition, the Appellants alleged that this action was in violation of IODL.

The IODL provides, "Except as provided in section 6.1 of this chapter, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them." Ind. Code § 5-14-1.5-3(a).⁴ Further:

In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order

to further support a party's legal argument. *trans. denied.* Thus, the inclusion of the supplemental evidence is only relevant as it relates to the Appellants' argument that they should have been permitted to supplement the record.

4. Indiana Code Section 5-14-1.5-6.1 describes "executive sessions."

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that the people may be fully informed. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.

I.C. § 5-14-1.5-1. The parties agree that the IODL applies to the October 11, 2005 BZA hearing. They disagree as to whether the BZA violated the IODL.

We cannot resolve this question, however, because the Appellants were not permitted to supplement the record. During the trial court proceedings, the Appellants sought to supplement the record with a videotape of the October 11, 2005 hearing, an advisory opinion for the Indiana Public Access Counselor, and a letter from the Jackson County Council notifying a BZA member that his appointment to the BZA had been revoked. The trial court ultimately struck the supplemental evidence and concluded that no IODL violation occurred.

[9] Concerning the evidence considered by a trial court during certiorari proceedings:

The court may determine the sufficiency of the statements of illegality contained in the petition, without further pleadings, and may make its determination and render its judgment with reference to the legality of the decision of the board of zoning appeals, on the facts set out in the return to the writ of certiorari. *If the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence to supplement the evidence and facts disclosed by the return to the writ of certiorari, but the review may not be by trial de novo. . . .*

I.C. § 36-7-4-1009 (emphasis added). In the context of this statute, our supreme court has observed that "supplemental" is defined as "that which is added to a thing to complete it." *Metro. Bd. of Zoning*

Appeals v. Gateway Corp., 256 Ind. 326, 336, 268 N.E.2d 736, 742 (1971). Said another way, "the trial court may permit additional evidence so long as it confines such evidence to subjects covered in the hearing before the zoning board." *Newman v. Spence*, 565 N.E.2d 350, 355 (Ind. Ct.App.1991).

Although the trial court was not required to consider supplemental evidence, it should have done so here. At issue is the conduct of the BZA members during the hearing—certainly the Appellants should have been able to supplement the record with evidence of what happened during the hearing. Further, Lykins and the BZA's arguments against the supplementation of the record go to the weight of the evidence, not to whether the record should be supplemented.

To be clear, we are not addressing the merits of the Appellants' claim; we are simply stating that a party alleging an IODL violation should have an opportunity to establish a record in support of the claim. Such an approach allows for the liberal construction of the IODL and creates a record of the evidence the parties submitted to the trial court and the trial court's evidentiary rulings on them. Thus, we remand for the trial court to consider evidence submitted by the parties on the Appellants' IODL claim, to determine the admissibility of the supplemental evidence, and to reconsider the merits of the claim in light of the supplemental evidence.

Conclusion

The Appellants are aggrieved by the BZA's decision and have standing to petition for a writ of certiorari. The trial court improperly failed to supplement the record regarding the Appellants' IODL claim. Accordingly, we reverse and remand for the trial court to consider the

merits of the Appellants' claims in light of our decision. We reverse and remand.

Reversed and remanded.

MATHIAS, J., and VAIDIK, J., concur.



INDI INVESTMENTS, LLC.,
Appellant-Plaintiff,

v.

CREDIT UNION 1 f/k/a Jet Credit
Union, Appellee-Defendant.

No. 49A02-0709-CV-782.

Court of Appeals of Indiana.

April 22, 2008.

Rehearing Denied July 7, 2008.

Background: Purchaser of property at sheriff's sale, after foreclosure of property's second mortgage, filed a petition moving to set aside the sale, alleging that it had been unaware when it purchased property that property continued to be subject to a first mortgage. After a hearing, the Marion Superior Court, Gary L. Miller, J., denied the motion to set aside the sale, and purchaser appealed.

Holdings: The Court of Appeals, Sharpnack, J., held that:

- (1) judgment of foreclosure did not require that notice of sale contain notice of first mortgage, and
- (2) purchaser was charged with actual notice of first mortgage.

Affirmed.

1. Mortgages \S 529(2), 578

The vacation of a sheriff's sale foreclosing a mortgage is committed to the

sound discretion of the trial court and is not to be disturbed absent a showing of an abuse of that discretion.

2. Mortgages \S 529(2)

A trial court is allowed to take a commonsense approach in deciding whether to vacate a sheriff's sale foreclosing a mortgage.

3. Mortgages \S 529(3, 5, 6)

In determining whether to set aside a sheriff's sale foreclosing a mortgage, a court takes into consideration all circumstances, such as the inadequacy of the price, the effect of procedural irregularities, inequitable conduct, evidence of mistake or misapprehension, and problems with title.

4. Appeal and Error \S 1079

A party generally waives any issue on appeal for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.

5. Mortgages \S 510(2)

The statute governing notice of sheriff's sale foreclosing a mortgage does not require the notice of sale to contain information regarding senior mortgages. West's A.I.C. 32-29-7-3.

6. Mortgages \S 510(2), 529(5)

Default judgment and decree of foreclosure on property's second mortgage did not require that notice of sheriff's sale of property contain notice that property was being sold subject to a first mortgage, so as to entitle purchaser of property a setting aside of the sale; judgment only required that property be sold subject to the first mortgage, not that the notice of sale mention the mortgage.

7. Mortgages \S 529(3)

Purchaser of property at sheriff's sale foreclosing second mortgage was charged

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