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ATTORNEY FOR APPELLANT:

ROBERT G. FORBES
Forcum, Forbes, Danielson
& Danielson LLP
Hartford City, Indiana

ATTORNEYS FOR APPELLEE
OOLMAN DAIRY, LLC:

JAMES A. FEDEROFF
JASON M. KUCHMAY
Federoff Law Firm, LLP
Fort Wayne, Indiana

ANTHONY O. CROWELL
Gordon & Associates, P.C.
Bluffton, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ELIZABETH THOMAS,)
Appellant-Intervenor,)
vs.)
OOLMAN DAIRY, LLC,) No. 05A02-0605-CV-418
Appellee-Petitioner,)
vs.)
BLACKFORD COUNTY AREA BOARD OF ZONING APPEALS,)
Appellee-Respondent.)

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Marianne L. Vorhees, Special Judge
Cause No. 05C01-0509-PL-183

December 7, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-intervenor Elizabeth Thomas appeals from the trial court's order reversing the decision of appellee-respondent Blackford County Area Board of Zoning Appeals (the Board) and requiring the Board to hold an evidentiary hearing on an application for special exception filed by appellee-petitioner Oolman Dairy, LLC (Oolman). Finding that the Board's decision was arbitrary, capricious, and contrary to law, we affirm the judgment of the trial court.

FACTS

A Blackford County zoning ordinance provides that a confined animal feeding operation (CAFO) is allowed only as a special exception in an agricultural district. Pursuant to the ordinance, an applicant for a special exception must demonstrate compliance with certain performance standards.

On April 21, 2005, Oolman submitted an application (the First Application) seeking the Board's approval of a special exception so that Oolman could operate a CAFO. On May 24, 2005, the Board held a public hearing on the First Application. At the hearing, all parties who desired to do so—including remonstrators—were able to present evidence and arguments on the application. The Board voted to table the matter until June 7, 2005, to provide the Board members with the opportunity to consider the evidence presented prior to voting on the First Application.

On the afternoon of June 7, 2005, prior to the commencement of the Board meeting, the Board's attorney conducted a telephone conference with Oolman's attorney and an attorney who was apparently representing a number of remonstrators. During the telephone conference, the Board's attorney indicated that he planned to advise the Board to deny the First Application based on Oolman's alleged failure to meet its burden of proving compliance with pertinent performance standards.

Following the telephone conference and prior to the Board meeting, Oolman formally withdrew its First Application in writing. The Board's executive director wrote "Accepted" on Oolman's written withdrawal. Appellant's App. p. 69. At the June 7, 2005, Board meeting, the withdrawal was read into the record and the hearing was adjourned with no further action taken on the First Application.

On June 28, 2005, Oolman filed another application (the Second Application) seeking the Board's approval of a special exception so that Oolman could operate a CAFO. The real estate at issue in the Second Application was a larger parcel than that involved in the First Application. At a public hearing scheduled on that same night, the Board was informed that Oolman had filed the Second Application. The Board's attorney advised the Board that it could vote on the First Application without considering new evidence or refuse to hear the Second Application. The attorney further advised the Board that he was of the opinion that the Board should refuse to conduct a hearing on the merits of the Second Application. After a lengthy discussion, the Board voted 3-2 to hold a public hearing on the Second Application. During the discussion, one of the Board members made the following comment:

> . . . I don't see how we could say that he can't re-apply. I mean, it doesn't say that. It doesn't say he can. It doesn't say he can't. We didn't . . . When we accepted it [the withdrawal of the First Application], we did not say you can't come back. We didn't say, he can't come back.

Appellee's App. p. 11. In making this decision, the Board expressly acknowledged that it was going against the advice of its attorney. The Board scheduled a public hearing on the Second Application for August 23, 2005, and subsequently provided all required public notice thereof.

Just prior to the start of the public hearing on August 23, 2005, the attorney for the remonstrators argued that the hearing should not proceed. The Board then voted to terminate the public hearing on the Second Application. The Board minutes reflect that it made this decision because the Second Application was "substantially similar" to the First Application—on which a full evidentiary hearing had already been held—and, therefore, holding the hearing "would be unfair to the remonstrators, and unduly burdensome to the Board . . . ." Appellant's App. p. 97-98.

On September 21, 2005, Oolman filed a petition for writ of certiorari seeking judicial review of the Board's refusal to hold a hearing on the Second Application. On December 12, 2005, the trial court granted Thomas's motion to intervene.[1] Following a hearing, on March 2, 2006, the trial court reversed the Board's decision. The trial court's order provides, in pertinent part, as follows:

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[1] Although neither party explains Thomas's relation to this litigation, we infer that she was a remonstrator in the proceedings before the Board from the fact that she is represented by the attorney who represented the

4. Indiana Law Regarding Special Exceptions: Indiana Code 36-7-4-918.2 and 36-7-4-920(a) require a public hearing on all applications for special exception, and require the [Board] to approve or deny all applications for special exception.

5. The Court's Conclusions as to the Facts: the [Board] held a public hearing on the First Application, but the [Board] did not approve or deny the application as required by the above statutory provisions. The [Board] allowed Oolman to withdraw the application without placing any conditions on the withdrawal. The issue is the effect of this withdrawal.

The parties did not find any authority directly on point, concerning the effect of withdrawing an application for special exception (or any similar application) in an administrative proceeding. The parties refer to concepts from the Indiana Trial Rules, such as Trial Rule 41. This Trial Rule does not exactly fit this situation, either. The section that most closely "fits" this case is Trial Rule 41(A)(1)(b), stipulation of dismissal, where both parties have agreed to dismiss an action, and the Rule states this dismissal is without prejudice, unless otherwise stated. Therefore, using Trial Rule 41 as a guideline, the Court finds that when Oolman withdrew its [F]irst [A]pplication, it was without prejudice, as the [Board] did not state otherwise when it accepted the withdrawal.

The Court also considers that the [Board] could have refused to allow Oolman to withdraw the [F]irst [A]pplication and could have proceeded to vote on the application as required by statute. . . .

As it happened, Oolman filed a [S]econd [A]pplication and the [Board] set the [S]econd [A]pplication for hearing. Then the [Board] declined to hold a hearing on the [S]econd [A]pplication and did not vote on the [S]econd [A]pplication. The result is that Oolman has never had the [Board] vote on either application and does not have a decision on the merits from which to appeal.

6. The Court's Conclusions of Law: The [Board]'s refusal to allow Oolman a public hearing on its [S]econd [A]pplication and its failure to vote on either application has denied Oolman due process of law. Oolman is entitled to a final decision in order to appeal the

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remonstrators throughout the administrative proceedings. Additionally, we observe that the Board has neither appeared nor filed a brief in this appeal.

> [Board]'s decision. At this time, the only feasible remedy is for the Court to remand this case to the [Board] with the direction to hold a public hearing on the [S]econd [A]pplication and to vote on the [S]econd [A]pplication.
>
> The Court further finds the [Board]'s refusal to hear evidence and to vote on the [S]econd [A]pplication was arbitrary and capricious. . . . The Record in this case reflects that the [Board] set the Second Application for hearing, advertised and gave notice as required, and the remonstrators and Oolman representatives appeared for a public hearing on that evening. The [Board] members were also present. The Court does not find any basis for the [Board]'s finding it would have been "unfair" or "unduly burdensome" to hold a public hearing on that night. This decision was arbitrary and capricious.
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> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision by the [Board] is reversed, the Court remands this case to the [Board] to hold a public hearing on the Second Application and to approve or deny the Second Application.

Appellant's App. p. 11-13 (emphases in original). Thomas now appeals.

DISCUSSION AND DECISION

Thomas argues that the Board accepted the withdrawal of the First Application with prejudice. Consequently, she contends that the Board properly refused to hear the Second Application, which was allegedly substantially similar to the first. Furthermore, Thomas argues that the Board's rationales for refusing to hold the previously-scheduled public hearing on the Second Application were proper.

<u>I. Standard of Review</u>

When reviewing the decision of an administrative agency, this court applies the same standard of review as did the trial court. <u>Hendricks County Bd. of Zoning Appeals v. Barlow</u>, 656 N.E.2d 481, 483 (Ind. Ct. App. 1995). Specifically, when reviewing an agency decision, we will reverse the decision only if it was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a 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. <u>Equicor Dev., Inc. v. The Westfield-Washington Twp. Plan Comm'n</u>, 758 N.E.2d 34, 36 (Ind. 2001).

An agency action is arbitrary and capricious if it is "willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion." <u>Id.</u> at 37. Moreover, if an agency misconstrues an ordinance, statute, or rule, there is no reasonable basis for the ultimate action and we must reverse the action as being arbitrary and capricious. <u>Ind.-Ky. Elec. Corp. v. Comm'r</u>, 820 N.E.2d 771, 777 (Ind. Ct. App. 2005).

The burden of demonstrating the invalidity of the agency action is on the party asserting invalidity. <u>Equicor</u>, 758 N.E.2d at 37. In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency. <u>Id.</u> On appeal, however, to the extent the trial court's factual findings were based on a paper record, this court conducts its own de novo review of the record. <u>Id.</u> If the trial court holds

an evidentiary hearing, this Court defers to the trial court to the extent its factual findings derive from the hearing. Id. If the contention on appeal is that the agency committed an error of law, we afford no deference to the agency and will reverse the decision if an error of law is demonstrated. Yater v. Hancock County Planning Comm'n, 614 N.E.2d 568, 570 (Ind. Ct. App. 1993).

II. Withdrawal of First Application

Thomas first argues that when the Board accepted Oolman's withdrawal of its First Application, it did so intending that the withdrawal would be with prejudice. She contends that the Board made this decision when it voted not to hear the Second Application at the hearing in August 2005. In the alternative, Thomas avers that it would not have been proper for the Board to have accepted the withdrawal without prejudice.

A. Timing of Acceptance of Withdrawal

First, we must consider when the Board accepted Oolman's withdrawal of the First Application. The record reveals that when Oolman filed its formal withdrawal on June 7, 2005, the executive director of the Board received the document and wrote "Accepted" on it. Appellant's App. p. 69. Later that evening at the Board meeting, the formal withdrawal was read into the record and the meeting was adjourned with no further action taken on the First Application.

Thomas argues, with no citation to supporting authority, that "it is irrelevant what an administrator does. Only the [Board] can affect substantive rights." Appellant's Br. p. 12. Essentially, therefore, Thomas contends that the Board neither accepted nor rejected

Oolman's withdrawal until it took an official vote on the matter. But inasmuch as the Board accepted the document for filing, read the withdrawal into the record, adjourned the meeting that was scheduled for the purpose of voting on the First Application, and did not vote on the First Application, it is apparent that the Board <u>did</u> accept Oolman's withdrawal on June 7, 2005.

Even if we were to find that the Board did not accept the withdrawal on June 7, 2005, however, the events that took place at the June 28, 2005, Board meeting—a meeting that Thomas entirely omits from her brief—dictate a conclusion that, at the latest, the Board accepted the withdrawal at that time. Specifically, at the June 28 meeting, the Board members conducted a lengthy discussion regarding Oolman's withdrawal of the First Application and submission of the Second Application. During the discussion, not only did all parties assume that Oolman had withdrawn his First Application, but one Board member explicitly made the following comment:

> . . . I don't see how we could say that he can't re-apply. I mean, it doesn't say that. It doesn't say he can. It doesn't say he can't. We didn't . . . <u>When we accepted it [the withdrawal of the First Application], we did not say you can't come back.</u> We didn't say, he can't come back.

Appellant's App. p. 11 (emphasis added).

After concluding that no rule, ordinance, or statute provided guidance regarding the withdrawal of an application for special exception and subsequent filing of a new application, the Board considered whether to hold a public hearing on the Second Application. The Board members debated the issue, considering, among other things, whether it was warranted to "start over," having already held a hearing on the First Application, and "go through the

whole thing from scratch." Id. at 12. According to the Board minutes from that hearing, "after much discussion, the [Board] voted 3-2 to hear the new application." Id. at 5. Although readily apparent that the Board had accepted the withdrawal of the First Application prior to that time, it is crystal clear that when it voted to hold a public hearing on Oolman's Second Application, it accepted the withdrawal of the First.

B. Nature of Withdrawal: With or Without Prejudice

Having determined that the Board accepted the withdrawal of the First Petition on June 28, 2005, at the latest, we must next consider whether it accepted the withdrawal with or without prejudice. The record reveals that Oolman filed the formal withdrawal before a vote was taken on the First Application, that a Board member commented that Oolman was never told that it could not refile the application, that the Board voted to hold a public hearing on the Second Application, and that the Board complied with all public notice requirements for that hearing. As a factual matter, therefore, it could not be clearer that the Board accepted the withdrawal of the First Application without prejudice. Had the withdrawal been with prejudice, the Board would never have scheduled or provided notice of a public hearing on the Second Application.

Thomas argues that when the Board voted at the August hearing—scheduled by the Board for the purpose of holding a hearing on the Second Application—to terminate that hearing, it indicated at that time that the withdrawal of the First Application was with prejudice. There is no support in the record, however, for this after-the-fact rationalization of the Board's actions. Indeed, the Board indicated that its reasons for deciding not to hold the

hearing were that the Second Application was substantially similar to the first and that holding the hearing would be unfair to the remonstrators and unduly burdensome for the Board. Nowhere in the Board minutes or transcript is there an iota of support for a conclusion that the hearing would not be held because Oolman's withdrawal of the First Application had been with prejudice. Thus, this argument must fail.

Although we have determined as a factual matter that the Board accepted the withdrawal of the First Application without prejudice, we will also address Thomas's legal arguments regarding the withdrawal. She turns to Indiana Trial Rule 41, arguing that this situation is most analogous to a voluntary dismissal by order of court. See Joyce Sportswear v. State Bd. of Tax Comm'rs, 684 N.E.2d 1189, 1193 (Ind. Tax Ct. 1997) (holding that where administrative rules are silent, the Indiana Trial Rules are applicable by analogy); Ind. Trial Rule 41(A)(2). She argues that, based on this rule, the First Application could only be withdrawn following an "official action" of the Board. Appellee's Br. p. 10. According to Thomas, the Board's first official action with respect to the withdrawal occurred at the August meeting, when it essentially determined that the withdrawal had been with prejudice.

As noted above, however, the Board voted on June 28, 2005, to hold a public hearing on the Second Application; at that time, its first "official action" clearly indicated that it considered the withdrawal of the First Application to have been without prejudice. Moreover, as determined above, there is no support for a conclusion that the Board's action at the August hearing indicated that it considered the withdrawal to have been with prejudice. Consequently, this argument must fail.

Thomas argues that the trial court erred in concluding that this situation is most analogous to a voluntary dismissal by stipulation. T.R. 41(A)(1)(b). Specifically, she contends that because the remonstrators did not sign a stipulation of dismissal, the withdrawal could not have been analogous to this provision. But the remonstrators were not a party to the agency proceeding; consequently, they had no right to take part in or stipulate to Oolman's withdrawal. That being said, we tend to agree that Trial Rule 41, in general, is not a precise fit for this situation. But inasmuch as we have determined that, as a factual matter, the Board accepted the withdrawal of the First Application without prejudice, we need not determine whether and to what extent Trial Rule 41 should guide our analysis.[2] Ultimately, therefore, we conclude that the Board accepted Oolman's withdrawal of the First Application without prejudice on June 28, 2005, at the latest.

III. Refusal to Hold Hearing on Second Application

Thomas next argues that the Board properly refused to hold the previously-scheduled public hearing on the Second Application. The Board's first rationale for refusing to hold the hearing was that the Second Application was "substantially similar" to the First Application, which Oolman had formally withdrawn following a hearing and presentation of evidence. Appellant's App. p. 97. Although neither the Board nor Thomas endeavor to explain why the apparent similarity between the applications is a valid reason to refuse to hold a hearing on the Second Application, we infer from the Board's statements that it concluded that Oolman

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[2] Thomas also argues, based on Rose v. Rose, 526 N.E.2d 231 (Ind. Ct. App. 1988), that the Board could not have properly accepted the withdrawal without prejudice pursuant to Trial Rule 41(A)(1)(a). She has waived

had already had its chance and was not entitled to a second one. Essentially, therefore, the Board based its decision, in part, on a res-judicata-like concept. All parties agree, however, that res judicata does not apply in this instance because the Board has never rendered a decision on the First Application. See Carpenter v. Whitley County Plan Comm'n, 174 Ind. App. 412, 414, 367 N.E.2d 1156, 1158 (Ind. Ct. App. 1977) (holding that for res judicata to bar a subsequent application to a board of zoning appeals, the board must have made a "prior and legally effective determination"); see also Appellee's App. p. 104. Thus, whether the First and Second Applications are substantially similar has no bearing on the Board's obligation to hold a hearing and rule on the Second Application.

The Board's next rationale for refusing to hold the previously-scheduled hearing was that "it would be unfair to the remonstrators," though it offered no explanation on how or why it would be unfair. Appellant's App. p. 97. And indeed, we cannot fathom how holding the previously-scheduled and properly-noticed hearing on the Second Application would have been unfair to the remonstrators in any way. The Board provided public notice of the hearing well in advance, and in response to that notice, a number of remonstrators provided written remonstrance to the Board and a number of remonstrators were physically present at the time the hearing was scheduled to take place. Thus, all necessary parties, including the remonstrators, were present and ready to proceed with the hearing until the Board voted to terminate the proceeding prematurely. Inasmuch as the remonstrators were given the

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her right to challenge the propriety of the Board's acceptance, however, inasmuch as she did not appeal that decision—made on June 28, 2005, at the latest—within thirty days. Ind. Code § 36-7-4-1003.

opportunity—and were prepared—to comment on and object to the Second Application, we conclude that holding the hearing would not have been unfair to those parties.

Finally, the Board cancelled the hearing because it would have been "unduly burdensome to the Board . . . to indulge further hearings on the same matter." Id. at 98. We can only assume that the Board members concluded that it would be an "undue burden" on them to hold a hearing on the Second Application when they had already held a hearing and considered evidence on the First—and "substantially similar"—Application. We are somewhat puzzled by this rationale, however, inasmuch as the Board had already voted in June to schedule and hold a public hearing on the Second Application. There is no evidence in the record that any circumstances changed between the vote in June and the public hearing in August at which the Board suddenly changed its mind and determined that it would be too burdensome to proceed. At the time of the scheduled public hearing, all Board members were present and prepared to proceed on the merits of the Second Application. Having already voted to hold a hearing and having provided public notice of that hearing, it was not the Board's prerogative to change course, with no valid explanation, mere minutes before the hearing was scheduled to begin. Consequently, we conclude that the Board's stated rationales for refusing to hold the hearing or vote on the Second Application are improper, rendering its decision arbitrary, capricious, and contrary to law.

As we concluded above, the Board accepted the withdrawal of the First Application without prejudice. Having done so, the Board is required by statute and by due process to hold a hearing on the Second Application. Ind. Code § 36-7-4-920(a) ("[t]he board of zoning

appeals shall fix a reasonable time for the hearing of administrative appeals, exceptions, uses, and variances"); City of Hobart Common Council v. Behavioral Inst. of Ind., LLC, 785 N.E.2d 238, 246-47 (Ind. Ct. App. 2003) (holding that boards of zoning appeals must comply with due process and "the constitutional standards of being orderly, impartial, judicious, and fundamentally fair"). Indeed, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" McKinney v. McKinney, 820 N.E.2d 682, 688 (Ind. Ct. App. 2005) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). Therefore, the Board was required as a matter of law to hold a public hearing on the Second Application and the trial court properly ordered it to do so.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.