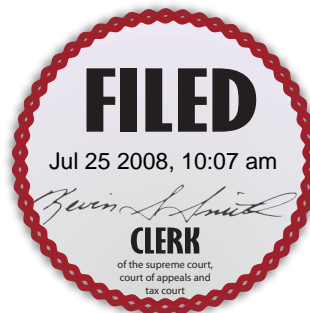


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ELIZABETH THOMAS,)
)
Appellant-Petitioner,)
)
vs.)
)
BLACKFORD COUNTY AREA BOARD)
OF ZONING APPEALS,)
)
Appellee-Respondent,)
)
OOLMAN DAIRY, LLC,)
)
Appellee-Intervenor.)

No. 05A04-0711-CV-731

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Joel D. Roberts, Special Judge
Cause No. 05C01-0609-PL-178

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Elizabeth Thomas appeals the dismissal of her petition for writ of certiorari from the Blackford County Board of Zoning Appeals (“BZA”). We reverse and remand.

FACTS AND PROCEDURAL HISTORY

Blackford County’s zoning ordinance permits confined animal feeding operations (“CAFOs”) in agricultural districts if the criteria for a special exception are met. Oolman Dairy sought a special exception to build and operate a CAFO that would keep 2,000 dairy cows on a 26.9-acre site in Blackford County. The site and the surrounding properties are in an agricultural district.

After a public hearing, the BZA issued findings of fact and a decision that concluded Oolman had met all the criteria for a special exception. Thomas, who owns property within half a mile of the site, filed a petition for writ of certiorari with the Blackford Circuit Court. Oolman intervened and filed a “Motion to Dismiss/Objection to Issuance of Writ of Certiorari.” (Appellee Oolman’s App. at 13.) Oolman argued, *inter alia*, Thomas was not an aggrieved party, and therefore did not have standing to petition for writ of certiorari. *See* Ind. Code § 36-7-4-1003(a) (a person aggrieved by decision of BZA may petition for writ of certiorari).

The trial court held a hearing on the issue of standing. Thomas testified she had driven to five dairy CAFOs and noticed an odor and flies within half a mile of two of the CAFOs. Gary Alexander, a real estate appraiser, reviewed studies on the effect of

CAFOs on property values in other states and testified Thomas' property would lose seventy percent of its value.

Oolman also presented expert witness testimony. Joel M. Buzzard, a real estate appraiser, testified concerning studies he completed of land sales in Huntington County. He concluded that, on average, properties within three miles of CAFOs spent less time on the market and sold for a higher price in relation to the residence's square footage than other rural properties. He considered the rural areas of Huntington County to be very similar to the rural areas of Blackford County. He believed these facts indicated properties near CAFOs were not stigmatized and Thomas' property would not decline in value due to the CAFO. Brian Daggy, an agricultural consultant, explained how Oolman's CAFO was different from the ones Thomas drove by and the ones in the studies on which Alexander relied.

On August 6, 2007, the court dismissed Thomas' petition for writ of certiorari. The trial court found Thomas' view of the CAFO was blocked by trees. It also concluded Thomas' "enjoyment of her property" would not be diminished by "offensive odors" if Oolman operated the CAFO in compliance with the zoning ordinance. (Appellant's App. at 10.) Finally, the court noted it was "not persuaded" by Alexander's data and methodology, and it concluded Thomas would not suffer a loss of property value. (*Id.*) Therefore, the court dismissed her petition for writ of certiorari for lack of standing.¹

¹ The trial court's order purports both to dismiss and deny Thomas' petition for writ of certiorari. Because the court had not yet ruled on Oolman's motion to dismiss, that should have been the posture of the parties at the hearing. However, the intentions of the parties and the trial court in holding the hearing are not apparent from the record. It is not clear whether the parties were presenting only sufficient

DISCUSSION AND DECISION

The parties dispute the standard of review applicable to this case. Oolman cites *Bridgeforth v. Thornton*, 847 N.E.2d 1015, 1023 (Ind. Ct. App. 2006), which states:

Where jurisdictional facts are not in dispute or where the trial court determines disputed facts based on nothing more than a “paper record,” the applicable standard of review is *de novo*. However, where, as here, the jurisdictional facts were disputed and the trial court conducted an evidentiary hearing to address the issue, the applicable standard of review requires this Court to give deference to the trial court’s findings of jurisdictional facts. Thus, we will reverse the trial court here only if its findings of fact or judgment are clearly erroneous.

(citations omitted.) *Bridgeforth* concerned a motion to dismiss for lack of subject matter jurisdiction under Ind. Trial Rule 12(B)(1).

A motion to dismiss for lack of standing falls under T.R. 12(B)(6). *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 813 (Ind. 2004) (“[A]lthough Lilly filed its motion under 12(B)(1), lack of subject matter jurisdiction, motions to dismiss for lack of standing are properly brought under 12(B)(6), for failure to state a claim.”). When reviewing a 12(B)(6) motion, we take as true all the allegations of the complaint. *Id.* at 814. The complaint may be dismissed only if the plaintiff would not be entitled to recover under any set of facts. *Id.* We view the pleadings in the light most favorable to the non-moving party, and draw every reasonable inference in favor of that party. *Id.*

evidence to dispose of the motion or were presenting all of their evidence on the issue of standing. Because we prefer parties to have the benefit of their day in court, *Cherokee Air Products, Inc. v. Burlington Ins. Co.*, 887 N.E.2d 984, 987 (Ind. Ct. App. 2008), we will treat the court’s order as a dismissal, rather than a denial on the merits of Thomas’ petition.

In this case, however, the trial court held a hearing at which Thomas and Oolman each presented witnesses. T.R. 12(C) provides in relevant part:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Summary judgment is appropriate under T.R. 56(C) if “the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The evidence presented at the hearing demonstrated a genuine issue of material fact regarding Thomas’ standing. Pursuant to Ind. Code § 36-7-4-1003(a), Thomas has standing to file a petition for writ of certiorari if she is “aggrieved” by a decision of a board of zoning appeals.

To be aggrieved, the petitioner must experience a “substantial grievance, a denial of some personal or property right or the imposition . . . of a burden or obligation.” The board of zoning appeals’ 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.

Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 786 (Ind. 2000) (citations omitted).

Viewed in Thomas’ favor, the evidence establishes an issue of fact as to whether Thomas will suffer unpleasant odors and a loss in property value. Therefore, resolution of the case under T.R. 56 was improper.

We remand to the trial court to afford the parties an opportunity to complete their presentation of evidence, if they have not done so already, and to render a decision on the merits.²

Reversed and remanded.

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

² Due to our resolution of the case, we need not address the other issues raised by Thomas.