

STATE OF INDIANA)
) SS:
COUNTY OF KOSCIUSKO)

IN THE KOSCIUSKO CIRCUIT COURT
CAUSE NO. 43C01-1602-MI-47

GERRY LEE POWELL, and)
PATRICIA ANN POWELL)
Plaintiffs,)
v.)
EPWORTH FOREST ADMINISTRATION)
COMMITTEE, INC.,)
ROBERT J. MILLER and)
DEBORAH S. MILLER)
Defendants.)

FILED
031
AUG 26 2016
Ann Jorpy
CLERK KOSCIUSKO CIRCUIT COURT

INTERVENORS ROBERT J. MILLER AND DEBORAH S. MILLER'S PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

COME NOW, the Intervenors/Defendants Robert J. Miller and Deborah S. Miller, by counsel, and pursuant to the Court's Order dated August 10, 2016, submit their proposed Findings of Fact, Conclusions of Law and Judgment as follows:

Findings of Fact

1. In 2015, Robert J. Miller and Deborah S. Miller (herein after "Millers:") purchased a lake cottage in the Epworth Forest Plat located on Lake Webster at 8223 E. Wade Lane, North Webster, Indiana, from Suetta M. Johnson.
2. At the time the Millers took possession of the lake cottage at 8223 E. Wade Lane in May of 2015, the piers had already been installed for the 2015 summer boating season.
3. Millers are "on shore" owners.
4. Jerry Lee Powell and Patricia Ann Powell (hereinafter "Powells") own a cottage in the Epworth Forest Plat located on Lake Webster located at 8227 E. Wesley Lane, North Webster, Indiana and are "off shore" owners.
5. Suetta M. Johnson had installed a pier in the mid 1990s which had permanent sockets for the pier posts and had a permanent place for attachment of the pier to the

seawall on her lot. Bob Roberts owned the lot immediately to the east of Suetta Johnson's lot and Kevin Smith owned the lot immediately to the west of Suetta Johnson's lot. Both were also on-shore owners.

6. Suetta Johnson docked a pontoon boat on the west side of her pier. She did not utilize the east side of her pier.

7. Before 2005, a relative of the Powell's, Jane Lesh, was the owner of 8227 E, Wesley lane and was the off shore owner utilizing the space between the Roberts' pier and the Johnson pier.

8. Compared to the current Powell pier, Jane Lesh had a short pier and never docked a large boat or had a boat lift installed. In 1996 and 1997, Jane Lesh did not place a pier in the space between the Roberts' pier and the Johnson pier.

9. The Powells initially were assigned to place their off shore pier on the Roberts' lot and were assigned pier placement number 35A. Over time, the Powells moved the placement of their pier west on to Johnson's lot.

10. After the Millers purchased the cottage at 8223 E. Wade Lane, they wanted to utilize both sides of their pier but could not do so due to the placement of the Powell pier. The on-shore owners immediately to the east (the Roberts) and west (Kevin Smith) of the Millers, as do the vast majority of on-shore owners at Epworth Forest utilize both sides of their piers by either docking boats or other watercraft or installing boat lifts.

11. Pursuant to regulations approved by this Court, on shore owners are allotted up to Twenty Four (24) Feet to use the Epworth Forest Administration Committee (hereinafter known as "EFAC"). EFAC assumed that the on shore owners pier would be placed in the middle of the Twenty Four (24) Feet allotted to on shore owners. None of the Court orders, regulations or EFAC By-Laws specifically sets forth or how to determine the location of the on shore owner's Twenty Four (24) Feet of space.

12. Millers sought clarification of the 24 feet of lake front footage assigned to on shore owners by submitting an online pier inquire form to EFAC was provided photographs of the Miller and Powell pier placement which showed the Millers could not

place a boat lift or utilize the east side of their pier due to the placement of the Powell pier and the positioning of the Powell boat lift on the west side of the Powell pier. EFAC also considered appropriate spacing requirements for pier placement and potential safety and liability concerns.

13. On January 6, 2016, EFAC held a hearing to discuss Miller/Powell pier placement matter. During the hearing before EFAC, the Powells acknowledged that the Millers cannot use the east side of the pier, nor do the Millers have Twenty Four (24) Feet of usable space for their pier, watercraft and related equipment.

14. On January 6, 2016, EFAC, by a three (3) to two (2) vote, determined that the Millers' recent purchase of their lake cottage, their desire to utilize both sides of their pier and EFAC's related concerns about spacing and safety constituted a substantial change in circumstances making the Powell pier assignment unreasonable under current facts and circumstances and further that the Powell pier would have to be removed and the Powells put on the displaced pier list.

15. The Powells appealed EFCA's initial decision and on February 15-16, 2016, EFAC thereafter voted, again by a three (3) to two (2) vote, to deny their appeal. This lawsuit seeking judicial review of the EFAC decision then ensued.

16. Prior to the decision involving the Powells' pier placement, EFAC and its predecessor, The North Indiana Conference of the United Methodist Church (hereinafter known as the "Conference") had relocated and/or removed off shore piers for a variety of reasons including spacing issues.

17. EFAC has a pier space available on the community pier for the Powells to use. Further, there is a public launch available for the Powells to access Lake Webster for boating purposes.

18. The Court takes judicial notice of various prior orders entered by the Kosciusko Circuit Court including orders in Cause No. 43C07-9109-CP-732. On August 2, 1994, Judge Richard Sand, then Judge of the Kosciusko Circuit Court, issued his "Record of Submissions Finding of Fact with Opinion and Judgment" which contained, in part, the

following findings found at pages 12-13:

The on-shore owners have a duty to permit the maintenance of the walkway, to allow fishing from the lake shore and to permit the Conference and the off-shore owners to establish piers at reasonable intervals. At reasonable intervals means *that off-shore owners and conference piers may not be placed in such proximity to on-shore owner piers as to create an unreasonable inconvenience to the on-shore owners in the use of their own piers*. The on-shore owners get first choice as to where they get to place their piers because they are the owner of the fee and many of the sea walls built by them are so built that there is a specific place within the frame of the sea wall in which a pier is designed to fit. As the off-shore owners must be accommodated in a manage fashion for so long as the conference remains operative on the grounds, *the off-shore owners right to pier placement must be managed through the Conference*. The Conference will, therefore, have managerial rights, as a Trustee for the benefit of the off-shore owners to assign pier spaces to accommodate the off-shore owners *without at the same time unduly burdening the on-shore owners*. To so manage the Conference must establish rules, which touching upon and concerning the land, are rules of the Conference which must be, under the restrictions on the plat, conformed to by the on-shore owners as well as the off-shore owners. Such management requires resources, and resources, that is people, cost money, the Conference may establish a reasonable pier permit fee which may be no greater than that reasonably require to actually fund the cost of that management. *Because of the management regulations which presumably be framed by the Conference for the benefit of the off-shore owners will also benefit the on-shore owners in that they must be designed to avoid over burdening the on-shore owners*, the on-shore owners must participate in the cost of that management expenditure. (emphasis supplied).

19. Judge Sand further found in his Judgment as follows:

That an exercise in rights and privileges inhering to the dominate tenement the Defendant for itself and for the benefit of the off-shore owners may establish reasonable regulations as maybe required to assure, first, that the on-shore owners may establish pier at their location of choice upon their lands, and then to allow *the placement of piers and the docking of boats by off-shore owners and by the Conference in a manner which imposes the least possible burden upon any one or group of on-shore owners...* (emphasis supplied).

20. The Conference promulgated a pier administration policy on August 25, 1995 which established a "pier administration committee... to administer the rules and

regulations adopted by the Trustees. " In part, the pier administration committee was to "B. Determine available pier locations for non-lakefront property owners" and "D. Arbitrate all disputes." (Emphasis supplied)

21. On November 7, 1997, Judge Sand issued a further order in Cause No. 43C01-9109-CP-732 by which the Court reviewed and approved the Conference's pier administration policy dated August 29, 1995. The Court further ordered that "any party alleging that the Conference has acted or failed to act in violation of this Court's judgment dated August 2, 1994, shall file a separate lawsuit alleging the same....The action or decision of the Conference *will not be reversed unless such action or decision is arbitrary, unreasonable, or capricious.*" (emphasis supplied)

22. On January 21, 2014, the Kosciusko Circuit Court in Cause No. 43C01-9109-CP-732 issued further orders relating to the management of pier placement at Epworth Forest on Lake Webster. This order found and ordered, in part, as follows:

8. Although not mandated by the Court, the regulations as adopted and applied by the conference should strive to:

a) Allow/provide for a five (5) foot clearance on both sides (for a total of ten (10) feet) of the dividing line between pier sites so that a ten (10) foot buffer zone may exist between all facilities and equipment utilized on the pier sites.

10. As a means of enforcing the Court's prior orders in this case, any party alleging that the conference as acted or failed to act in violation of the Judgment and/or as provided herein, shall file a separate lawsuit in this Court alleging same... The action or decision of the conference *will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious.*" (Emphasis supplied).

23. On April 15, 2014 the Kosciusko Circuit Court in Cause No. 43C01-9109-CP-732 issued an Agreed Order Granting Relief Pursuant to T.R. 60 Through Modified Judgment. That Agreed Order stated in part as follows:

14. The conference shall set up the EFAC with By-Laws, rules and regulations which state or establish the following principals and rules which can only be altered with Court approval:

j. On -shore owners' pier assignments will continue from year to year and be presumed permanent. An off-shore pier assignment/location, in accordance with the 1994 judgment, may be changed only for substantial change of circumstances making the prior assignment unreasonable *under current facts and circumstances*. (Emphasis supplied).

24. The By-Laws of the Epworth Forest Administration Committee, Inc., state in part as follows at Article IV, Section 6(c): "To ensure that off-shore pier assignment/location, in accordance with the 1994 judgment, may only be changed, *in the sole discretion of the board of directors*, for a substantial change in circumstances making the prior assignment unreasonable under the facts and circumstances;" (emphasis supplied).

25. Due to the placement of the Powells' pier, the Millers could not use the east side of their pier. The vast majority of onshore owners have the ability to and do in fact use both sides of their piers which includes the placement of boat lifts.

26. In making decisions regarding pier placement, EFAC considers the prior Court Orders, the historical perspective and possibly visits the pier site in question. Exhibit "E" to the Court's Order of January 21, 2014 was utilized by EFAC only as a "starting point" for any decisions relating to the pier placement as the exhibit contained a number of inaccuracies.

Conclusions of Law

1. Pursuant to the prior orders of this Court, the decisions of EFAC (and it's predecessor, the Conference) "will not be reversed unless such action or decision is arbitrary, unreasonable or capricious."

2. The use of the arbitrary, unreasonable and capricious standard is most analogous to the standard of review applied to the administrative decisions of zoning, land use or planning boards. Accordingly, the Court will apply these standards for the review of the EFAC decision in this case. (See *Kranz v. Meyers Subdivision Property Owners Association, Inc.* (2002), Ind.App., 909 N.E. 2d 1068, a case affirming the Trial Court's decision to affirm a decision of the Natural Resource Commission to require a property

owner to move a pier.)

3. In conducting judicial review of an agency decision, the Court is not to “try the facts de novo or substitute its own judgment for that of the agency.” *Equicor Development, Inc. v. Westfield-Washington Township Plan Commission* (2001), Ind., 758 N.E. 2d 34, at 37. In determining whether a decision is arbitrary and capricious, the test is “whether there is no reasonable basis for the action.” *Equicor* at 38. “A decision is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts of the circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.” *Equicor* at 37. Further, the Court is “to presume that the [agency’s] decision was correct. *Vanvactor Farms, Inc., v. Marshall County Plan Commission* (2003), Ind. App., 793 N.E. 2d. 1136.

4. The Court concludes that there was a reasonable basis for the decision taken by EFAC in that: (a) there was a substantial change in circumstances due to the fact that the Millers were new owners of real estate on Webster Lake and the Millers wanted to utilize both sides of the pier that had been in place at that location since the mid 1990's; (b) the Millers did not have full use of the Twenty Four (24) Feet allotted to an on shore owner; (c) given the current placement of the Powell pier, the Millers could not utilize both sides of their pier; (d) there were spacing and safety issues arising out of current locations of the Miller and Powell piers that had to be addressed.

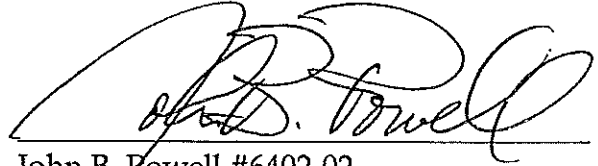
5. Given all the factors considered by EFAC, the EFAC decision was not arbitrary, capricious or unreasonable.

6. Accordingly, the decision of EFAC under review in this case is affirmed and made an order of this Court.

Dated: _____

Judge, Kosciusko Circuit Court

Respectfully submitted,




John B. Powell #6402-02
Shambaugh, Kast, Beck & Williams, LLP
229 West Berry Street, Suite 400
P.O. Box 11648
Fort Wayne, Indiana 46859
ATTORNEY FOR ROBERT MILLER AND
DEBORAH MILLER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent, by United States Mail, postage prepaid, hand delivery or other means accepted by this Court, to the individuals listed below on the 7th day of August, 2016.

Stephen Snyder
200 West Main Street
Syracuse, IN 46567

Matthew R. Shipman
119 S. Main Street
P.O. Box 807
Columbia City, Indiana 46725



John B. Powell