

IN THE INDIANA COURT OF APPEALS
Appellate Case No. 43A03-1610-MI-02332

EPWORTH FOREST ADMINISTRATION)
COMMITTEE, INC.)
Appellant/Defendant below,)
v.)
GERRY LEE POWELL,)
PATRICIA ANN POWELL,)
Appellee/Plaintiffs below,)
And)
ROBERT MILLER and DEBORAH MILLER)
Appellee/Defendants below)

)Appeal from the Kosciusko Circuit Court
)Trial Court Case No.:43C01-1602-MI-47
)
)
)The Honorable Michael W. Reed, Judge
)
)

BRIEF OF APPELLANT

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I. STATEMENT OF THE ISSUES

I. Whether the trial court's September 9, 2016, Findings of Fact, Conclusions of Law and Judgment was clearly erroneous.

II. STATEMENT OF THE CASE

On January 26, 2016, an appeal was heard by Epworth Forest Administration Committee, Inc. ("EFAC") regarding EFAC's decision to remove the pier of the Appellees-Plaintiffs, Gerry Lee Powell and Patricia Ann Powell (collectively the "Powells"), from the property owned by Appellees-Intervenors, Robert and Deborah Miller (collectively the "Millers"). (Exhibit E). On February 16, 2016, a decision was reached by EFAC, by a vote of 3 to 2, upholding EFAC's previous decision that the Powells' pier needed to be moved from the Millers' property. (Exhibit 1).

The Powells filed their Complaint for Judicial Review of that February 16, 2016, EFAC decision on February 18, 2016. (Appellant's App. pp. 2, 7). EFAC filed their Answer to the Powells' complaint on March 8, 2016. (Appellant's App. pp. 2, 10). On March 10, 2016, the Millers filed a Motion to Intervene pursuant to Ind. Tr. R. 24. (Appellant's App. pp. 2, 13). On March 10, 2016, the trial court granted the Millers' Motion to Intervene. (Appellant's App. pp. 2, 16). On March 21, 2016, the Powells filed a Motion to Stay which the parties stipulated to treat as a request for preliminary injunction. (Appellant's App. pp. 3, 18). On May 4, 2016, the trial court held a hearing on the Powells' Motion to Stay, with the trial court taking the matter under advisement. (Appellant's App. p. 4). On May 24, 2016, the trial court issued its Findings of Fact, Conclusions of Law and Order on Powells' Motion to Stay, which Order provided that "Epworth Forest Administration Committee, Inc is preliminarily enjoined from enforcement of its Order issued January 26, 2016, requiring Plaintiffs to remove their pier and boat lift from Pier

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Space 34A, or in any way interfering with the Plaintiffs' use of Pier Space 34A as previously assigned." (Appellant's App. pp. 5, 20). On August 10, 2016, the parties filed a Stipulation pursuant to Ind. R. Tr. Pro. 65(A)(2) that all evidence, including testimony and exhibits presented at the hearing on the Preliminary Injunction (motion to stay) shall be part of the record in this matter and need not be repeated at trial. (Appellant's App. pp. 5, 25).

The hearing on Powells' Complaint was held on August 10, 2016. (Appellant's App. pp. 5, 26). At the hearing, the Court heard evidence, took the issues under advisement, and ordered the parties to submit proposed findings of fact and conclusions of law pertaining to all outstanding issues. (Appellant's App. pp. 5, 26). The trial court issued its Findings of Fact, Conclusions of Law and Judgment on September 9, 2016. (Appellant's App. pp. 5, 27). In its Order, the trial court overturned the decision of EFAC. (Appellant's App. pp. 27-31).

On October 7, 2016, EFAC filed its Notice of Appeal. (Appellant's App. pp. 6, 36). On October 10, 2016, the Millers filed their Notice of Appeal. (Appellant's App. p. 36). On October 26, 2016, a Notice of Completion of Clerk's Record was filed. (Appellant's App. p. 36). On December 14, 2016, a Notice of Completion of Transcript was filed. (Appellant's App. p. 36). On January 10, 2017, this Court granted EFAC's Corrected Verified Motion for a 30-Day Extension of Time to file Appellant's Brief, up to and including February 13, 2017. (Appellant's App. p. 35). EFAC now files this Brief, and maintains that the trial court's September 9, 2016, Findings of Fact, Conclusions of Law and Judgment were clearly erroneous.

III. STATEMENT OF THE FACTS

Epworth Forest consists of onshore and offshore lots located on Webster Lake in Kosciusko County, Indiana. (Appellant's App. p. 7). The Powells own real estate legally described as Lot 12 in Block C in the Plat of Epworth Forest. (Appellant's App. p. 7). The

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Powells inherited this property in 2004. (Tr. p. 8). The Powells' property is not on the lake front of Webster Lake. (Appellant's App. p.7). However, the Powells' have a pier which is located on the lakefront at the junction of platted Lots 34 and 35 of Epworth Forest. (Tr. p. 8). In 2005 the Powells replaced their three foot wide wood pier at this location with a four foot wide aluminum pier and added a twelve foot wide boat lift. (Tr. pp. 31-32, 39). The Powells also stored their boat on the opposite side of the pier from 2005 onward. (Tr. p. 114). The footprint of the Powell pier is two to three times larger than the footprint of the previous owner of their property and pier location. (Tr. p. 114). At least one year, the Powells' pier straddled the property line between Lots 34 and 35. (Tr. p. 32). The Powells' pier is in the same location that it was located in on January 21, 2014, when the trial court fixed the locations of the piers. (Tr. p. 11).

The Roberts, the property to the east of the Powells, use their whole 50 feet of shoreline because they do not allow anyone else on the lakefront with them. (Tr. p. 35). In 2005, the first year that the Powells installed their pier, it was located on the Roberts property to the east not on the Millers' property (Tr. p. 115). For several years the Roberts put a short pier in next to the Powells' pier that made it tough for the Powells to put in their pier. (Tr. p. 13). There were a couple of years in the 1990s when the Powells' predecessors in interest to the pier, did not put the pier in. (Tr. p. 110).

Lot 34 is owned by the Millers as of May 2015. (Tr. pp. 8, 47). Prior to the Millers purchase of Lot 34, Suetta Johnson owned Lot 34 since approximately 1994. (Tr. p. 9). The Millers' pier was put in permanent sockets when Suetta Johnson owned the Millers' property somewhere in the 1990s. (Tr. p. 19). The Millers' pier is in the same location that it was located

on January 21, 2014, when the trial court fixed the locations of the piers.¹ (Tr. p. 11). When the Millers purchased their property, the pier was not in the water and they had no idea where the pier would be located other than Mr. Miller could see in the seawall where some lag bolts were attached. (Tr. pp. 47-48). Mr. Miller believed that this is the location where the pier would be located (Tr. pp. 47-48). The Millers are requesting that their pier stay in the same location and that they be allowed to place a boat lift on both sides of their pier. (Tr. p 48). The Miller pier is four feet wide where they would like to place the boat lifts and one boat lift is ten feet wide and one boat lift is ten to twelve foot wide. (Tr. p. 49).

The neighbors on both sides of Powells and the Millers utilize both sides of their pier. (Tr. p. 35). Mr. Powell thinks it is reasonable for the Millers to want to use both sides of their pier. (Tr. p. 21). Mr. Powell admitted that the Millers cannot put a boat lift on the east side of their pier and have any buffer space between Powells' pier and boat lift. (Tr. p. 36). There is 32 feet between the east side of the Millers' pier and the west side of the Powells' pier. (Tr. pp. 25-26).

After purchasing the Lakefront Lot, the Millers submitted an initial pier inquiry form to EFAC on July 21, 2015. (Tr. pp. 52-53). On November 18, 2015, Millers sent another pier inquiry form asking EFAC to allow permission to use both sides of their pier. (Tr. p. 53)(Defendant's Exhibit A). Specifically, the Millers' pier inquiry form stated:

We have request the use of our full pier space beginning next year. We will use our allotted pier space of 24 feet from shoreline to the end and on both sides of the pier in order to store our watercraft. We will be adding an additionally boat lift on the opposite side of the pier along with smaller lifts for additional watercraft. These will be on each side of the pier from the boat lift to the shore. We will need enough space to mover our watercraft into and out of their moorings safely. Please note that our pier is permanent pier in sockets. Measuring from the

¹ The right of homeowners in Epworth Forest to place piers along the shoreline of Webster Lake has been heavily litigated since 1991 under Cause 43C01-9109-CP-732 in the Kosciusko Circuit Court. The January 21, 2014 Order is from that litigation.

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east side of our pier to our east property line (toward Robert's) is 27 feet. Assuming our boat lift will be 10' on the east side of our pier, it leaves 17 feet of space our shoreline.

(Defendant's Exhibit A). As a result of the Millers' pier inquiry form submittal, EFAC met on January 6, 2016, and invited the Powells and the Millers to attend. (Tr. p. 67). The Powells participated in the meeting by phone and the Millers did not appear. (Tr. p. 67). According to the meeting minutes of the January 6, 2016, meeting of EFAC, the offshore directors expressed that the Millers' desire to use a 24 foot area was a change to the historical assignment which had been 16 feet by Suetta Johnson and that therefore EFAC could choose to deny that the location of the Millers additional footage go to the east towards the Powells' pier, thereby displacing the Powells' pier. (Exhibit C). The onshore directors of EFAC stated that this was not an assignment change and that they felt like they could not tell the Millers were their additional 8 feet could be. (Exhibit C). As a result, by a 3-2 vote, the Board voted to give the Millers the 8 feet to the east of their pier with the understanding that this would displace the Powell pier. (Exhibit C). The minutes of the January 6, 2016, meeting demonstrate that EFAC thought the Millers wanting to use both sides of their pier was a substantial change in circumstance. (Exhibit C).

The Powells appealed this initial decision of EFAC. (Tr. pp. 68-69). On January 26, 2016, an appeal was heard by EFAC regarding EFAC's decision to remove the pier of the Powells, from the property owned by the Millers. (Exhibit E). Prior to the January 26, 2016, hearing on the Powells' appeal, the Board adopted a protocol for procedurally how the appeal hearing would be handled. (Tr. p. 69)(Exhibit D). The Board adopted meeting minutes of the January 26, 2016, appeal hearing. (Exhibit E).

In reaching their decision, the Board started their analysis with the January 21, 2014, Order which stated that onshore owners should have more space allotted to them then offshore

owners. (Tr. p. 72). The Board also analyzed the court's suggestion that EFAC should strive for ten feet between pier assignment with five foot on each side of the pier. (Tr. p. 72). EFAC also acknowledged that the onshore pier location was presumed to be permanent. (Tr. p. 72). The Board assumed that the twenty-four feet of space assigned to the Milers was centered on their pier. (Tr. p. 86). The assumption that an onshore owner's pier is the center of their twenty-four assignment is based off of every other pier in Epworth Forest. (Tr. p. 86). The Board also assumed that moving an onshore pier would violate the trial court's orders that said that onshore assignments were permanent. (Tr. p. 86). Nevertheless, EFAC evaluated whether they could move the Millers' pier and decided that moving the Millers' pier would only create other problems. (Tr. p. 86). The piers in Epworth Forest are so close together that moving one pier can sometimes affect other piers. (Tr. pp. 86, 87).

EFAC also acknowledged that the Millers were not moving their pier but rather were just asking to use the 24 feet that was allowed them (Tr. p. 72). The Board reviewed the distances from the Millers' pier to the property to the west (the Smiths) and found that to be about 26 feet. (Tr. p. 72). When you added in the Smiths' boat lift and the boat lift of the Millers on the west side of their pier, there was only a four to six foot gap between the Smiths' boat lift and the Millers' boat lift. (Tr. p. 72). Mr. Presser testified that if the Millers moved their pier to the west, it would reduce the buffer between the Millers and their neighbor to the West (Smith) such that the Millers could not get their sail boat out along the west side of the Millers' pier. (Tr. p. 55).

As a result, EFAC determined that there was not space to move the Miller pier to the West without eliminating the buffer with the Smith boat lift. (Tr. p. 72). EFAC analyzed that on the east side towards the Powells' pier that the two piers would be butted up against one another which would not give the suggested ten foot buffer. (Tr. pp. 72-73). EFAC also acknowledged

that the Millers have watercraft that they put in front of their two lifts, so they need access to the lake from the front of their piers. (Tr. p. 73). EFAC thought that moving anything at all would completely block the Millers access to the lake so that they couldn't get their watercraft out into the lake properly. (Tr. p. 73). EFAC felt like the only choice that they had that maintained the buffer was to give the Millers their 24 feet and to relocate the Powells' pier (Tr. p. 73). EFAC also determined that asking the Millers to move their pier would have had an impact on three properties to the west of the Miller property. (Tr. p. 152). The three members of EFAC who voted to displace the Powells' pier felt like that was the only interpretation of the Court's Orders. (Tr. p. 73). EFAC also thought that they had no authority to move onshore owner's piers. (Tr. p. 73). Even if EFAC could have moved the Millers' pier, it would not have solved the problem. (Tr. p. 73).

EFAC has interpreted the Court's Orders to mean that the pier location is the center of an onshore pier assignment's twenty-four feet. (Tr. pp. 74. 165). EFAC has interpreted the offshore owners sixteen feet to mean that an offshore owner can only have a boat lift on one side of their pier and only have one boat. (Tr. p. 74). Because the onshore pier owners got to choose their pier location first and because their pier locations are permanent pursuant to the Court's Order, EFAC always assumed that the twenty-four feet assigned to an onshore owner was centered around their pier. (Tr. p. 147). After the 1994 Order, the conference notified all pier owners in 1995 that the onshore owners were to put their piers in first on their property. (Tr. p. 147). No offshore piers were put in at that time. (Tr. p. 147). Suetta Johnson put her pier in its current location in 1995. (Tr. p. 148). Suetta Johnsons' pier (now the Miller pier) was placed in sockets so it has not moved since that time as the sockets are permanently located in the lake bed. (Tr. p. 148). In the summer of 1995, after the onshore owners placed their piers in place,

the Conference started assigning pier locations to the offshore property owners. (Tr. p. 148).

Richard Presser, vice president of the EFAC Board, did not know the Millers or Powells when he voted to displace the Powells' pier. (Tr. p. 75). He did not vote to displace the Powells because of any animosity towards the Powells or the Millers. (Tr. p. 75). The Board allowed the Powells to submit a written brief summarizing their position and the Board contemplated that brief prior to making its decision. (Tr. pp. 76-77)(Exhibit E). Richard Presser also had previously presented a written memorandum which contained guidance from the Indiana Department of Natural Resources regarding the reasonable buffer zones around piers and that was part of the information that EFAC considered when they made their decision. (Tr. pp. 77-79)(Exhibit F). The three Board members who voted to displace the Powell pier considered the request of the Millers to use both sides of their pier and asking to use a full twenty-four feet as a substantial change in circumstances. (Tr. p. 79). EFAC was trying to follow the Orders of the trial court when they made their decision. (Tr. p. 79).

Lindsey Grossnickle was appointed by Judge Reed as the Fifth Board member of EFAC. (Tr. pp. 166, 167) (Appellant's App. p. 33). Ms. Grossnickle is a licensed attorney in the State of Indiana. (Tr. pp. 166, 167). She was involved in the Board's deliberation leading up to the Powell decision. (Tr. p. 167). As an attorney, she is trained to interpret court orders and did so in helping to guide her decision to vote to displace the Powells. (Tr. p. 171). Ms. Grossnickle used that knowledge to ensure, to the best of her abilities, that the appeals process that EFAC followed was in compliance with the Court's Order. (Tr. p. 171). Ms. Grossnickle testified that EFAC evaluated all of the testimony and evidence that was provided by the Powells in making their decision. (Tr. p. 172). Ms. Grossnickle voted as part of the 3 to 2 vote to displace the Powells. (Tr. p. 175). As a lawyer, Ms. Grossnickle considered the 1994 Order that stated that

onshore owner's piers go in first and the April, 15, 2014, Order that says that onshore pier assignments would be permanent in making her decision. (Exhibit 6)(Tr. p. 176). Ms. Grossnickle testified that the Millers wanting to utilize their full twenty-four feet was the substantial chance in circumstances that allowed Powells pier to be displaced. (Tr. p. 177). Mr. Powell himself agreed that the Millers could not use the full twenty-four feet where the Miller pier is currently located. (Tr. p. 178). The courts orders do not say where the twenty-four feet should stop or start so Ms. Grossnickle testified that EFAC had always used the pier location as the center point of the twenty-four feet. (Tr. p. 179). Nothing in the Court's orders prohibit using the pier as the center point of the twenty-four feet. (Tr. p. 179). As a lawyer, Ms. Grossnickle thought it was a reasonable interpretation of the Court's previous orders to center the twenty-four feet on the pier location. (Tr. p. 179).

EFAC has a wait list which includes all property owners seeking a pier location. (Tr. p. 74). When an offshore owner's pier gets displaced, they get put on the displaced list, which is at the top of the wait list. (Tr. p. 74). The displaced list has property owners whose pier was moved due to overcrowding or spacing issue or any other reason that a property owner got displaced because of EFAC's interpretation of the trial court's Orders. (Tr. p. 74). The Board believes that there is space available for the Powells on one of the community piers. (Tr. p. 75).

On February 16, 2016, a decision was reached by EFAC, by a vote of 3 to 2, upholding EFAC's previous decision that the Powells' pier needed to be moved from the Millers' property. (Exhibit 1). The Powells filed their Complaint for Judicial Review of that February 16, 2016, EFAC decision on February 18, 2016. (Appellant's App. pp. 2, 7). EFAC filed their Answer to the Powells' complaint on March 8, 2016. On March 10, 2016, the Millers filed a Motion to Intervene pursuant to Ind. Tr. R. 24. (Appellant's App. pp. 2, 13). On March 10, 2016, the trial

court granted the Millers' Motion to Intervene. (Appellant's App. pp. 2, 16).

The hearing on Powells' Complaint was held on August 10, 2016. (Appellant's App. p. 5). At the hearing, the Court heard evidence, took the issues under advisement, and ordered the parties to submit proposed findings of fact and conclusions of law pertaining to all outstanding issues. (Appellant's App. p. 5). However, prior to going off the record the Honorable Judge Michael Reed stated that:

For the people in the audience, I tried to do on January 24, 2014, the best I could do to make my intentions clear and I suffer from the same human failings that many people do as I can't think of every possibility, I guess, and *what I thought was clear, maybe wasn't clear*. When it says assignment and we've used the word, pier assignment, I guess I've got to go back and look. Assignment, I guess that was too broad a question. I guess when I looked at this and saw footage and there's the footage, here it is on each one, that we'd keep the people within those footages. You guys already know what I'm thinking about. Where does it say you get to use both sides of your pier. What you were actually using then was within that frame. That was meant to avoid these kind of issues in my own mind. Because what changes is obviously the stuff. The locations never change. Location meaning if we've got a 50-foot wide lot, we put a 24-foot onshore spot and a 16-foot offshore. That's 40 feet. We give them each 5 feet of leeway. You've got 50 foot right and we utilize a location. The location being within those. Whether I made that clear enough and that has to stand up, I guess I got to go back and look at all of that. But my hope was we'd avoid these kinds of arguments. Life is complicated. People can't get along. I get that and I guess my opinion is the one that has to carry the day just because we can't have a 140 or fifty other opinions. *It doesn't mean what people didn't do wasn't reasonable*. I appreciate what the Board did. *Was that reasonable? If I didn't give them enough guidance, it's not the Board's fault. It's my fault. I wish I was rewriting it today but we all live and learn*.

(Tr. pp. 195-6)(emphasis added).

The rights and obligation of non-lakefront owners of lots in the Plat of Epworth Forest have been determined by judgment and various orders of the trial court in Cause No. 43C01-910-CP-732, Barnes v, Northern Indiana Annual Conference of the United Methodist Church et. al., in particular, the Judgment entered August 2, 1994, (Exhibit 2),

the Order dated November 7, 1997, (Exhibit 3), the Order dated January 21, 2014, (Exhibit 5) and the Order dated April 15, 2014, (Exhibit 6).

The January 21, 2014, Order of the trial court set the rules for how pier locations would be established in the Epworth Forest Addition on Webster Lake. In relevant part that Order stated:

5. In the Order, this Court made the following findings, conclusions and orders:

(1) The North Indiana Conference of the United Methodist Church ("Conference") has enacted reasonable regulations and procedures to carry out the responsibilities assigned to the Conference in this Court's judgment dated August 2, 1994. The Court has reviewed and approves the Pier Administration Policy, a copy of which is attached. The Court orders the Conference to maintain a copy of the Pier Administration Policy and a map showing the approximate assigned and unassigned pier locations at a place within Epworth Forest which is available to Epworth Forest lot owners at reasonable times.

(2) As a means of enforcing this Court's prior orders in this case, 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 that the Conference has acted or failed to act in violation of this Court's judgment of August 2, 1994, may be heard only if the party alleging the violation has complied with the issue submission procedure included in the Pier Administration Policy. The action or decision of the Conference will not be reversed unless such action or decision is arbitrary, unreasonable or capricious.

The Court FURTHER FINDS and ORDERS as follows:

1. That the duty to establish reasonable regulations imposed on the Conference in the Judgment included the duty to modify or change these regulations when appropriate, with the Conference always being mindful that stability and predictability are important considerations when considering any such changes.

2. The Conference utilized the regulations approved by this Court in the Order for quite some time until, due to changes of the circumstances in Epworth Forest over time, including the need to identify more acceptable on-shore pier spots and to alleviate over-crowding on some areas of the lakeshore, the Conference adopted new regulations known as the Epworth Forest Pier Administration Policy revised April 15, 2011, the Epworth Forest Pier Administration Policy Pier Violation Enforcement Policy approved February,

2010, and a map or list showing pier placements for 2014 developed pursuant to these policies, copies of which are attached hereto and made a part hereof as Exhibits "C", "D", and "E".

3. The Court's Judgment does not expressly require the regulations adopted by the Conference to be approved by the Court in order for the regulations, including the fees to be assessed, to be binding and effective; however, the Court approved prior regulations in its Order and has approved the new regulation as provided hereafter to resolve any possible issue in this regard.

4. The Court finds that the new regulations and placements submitted to the Court are reasonable, are not arbitrary nor capricious, and are based on valid considerations, including the need to fairly allocate the burden of the Court's Judgment in a rationale fashion considering the rights and obligations of the residents of Epworth Forest as a whole, and which shall be approved by the Court as submitted, except as provided otherwise herein.

...

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; and

b) Burden any one on-shore owner with only one (1) off-shore pier site.

9. The Conference has enacted reasonable regulations and procedures to carry out the responsibilities assigned to the Conference in the Judgment. The Court has further reviewed and approves the regulations known as The Epworth Forest Pier Administration Policy revised April 15, 2011, the Epworth Forest Pier Administration Policy Pier Violation Enforcement Policy approved February, 2010, and the map or list showing pier placements for 2014 developed pursuant to these policies, copies of which are attached hereto and made a part hereof as Exhibits "C", "D" and "E" as well as the current fee schedule testified to in open court, except as expressly modified herein.

(Exhibit 5).

Pursuant to the April 15, 2014, Order, EFAC was established. (Exhibit 6). Since the April 15, 2014, Order, EFAC has administered the lakefront of Epworth Forest,

including the assignment of pier location for both onshore and offshore lot owners.

(Exhibit 6). That April 15, 2014, Order states in pertinent part as follows:

3. The court having reviewed the evidence, the arguments of those present, and being duly advised in the premises, now FINDS that it is no longer equitable that the Conference be subject to the prospective effect of the '94 Judgment and that pursuant to T.R. 60(D), it would be equitable (both for the Conference and all owners in Epworth Forest) for the Court to "alter, amend [or] modify" the '94 Judgment and, therefore, the Court now GRANTS the requested relief to the Conference and further ORDERS that this Court's prior Judgments and Orders are hereby ALTERED, AMENDED, MODIFIED OR CORRECTED as set out below.

...

5. The Conference is hereby relieved of any financial, leadership, administrative or other duties, responsibilities and burdens associated with the management of the Easement, the Pier Committee, pier placements and/or all other functions performed by the Conference pursuant to the '94 Judgment (the "94 Duties") and is further released from any past, present and future liability arising out of, related to, or connected with its administration of the '94 Duties.

...

10. The Conference will establish an independent not-for-profit corporation to be the successor to the '94 Duties (the "Epworth Forest Administration Committee") and the Court hereby orders that '94 Duties are assigned to that corporation, consistent with the terms of this Order.

11. The Conference will produce financial books and records that may be needed by the Epworth Forest Administration Committee ("EFAC") to conduct its business.

...

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

a. The purpose of the EFAC will be to manage all rights, obligations and disputes related to the Easement created by the original Plat and defined by the '94 Order and subsequent rulings and to accept the assignment from the Conference of all the '94 Duties.

b. The '94 Judgment as altered, amended or modified by subsequent Court Orders will continue to define the existing rights of the owners in Epworth Forest;

c. The EFAC will be managed by its Board of Directors which will be comprised of:

- i. 2 directors who are selected by the lot owners of Epworth Forest who own lots that are "on-shore"; and
- ii. 2 directors who are selected by the lot owners of Epworth Forest who own lots that are "off-shore";
- iii. 1 director whose initial appointment is to be made by this Court and thereafter will be made by the unanimous consent of the 4 elected directors and if unanimous vote of the Directors cannot be reached then by appointment by the Kosciusko Circuit Court on petition of any lot owner in Epworth Forest.

d. The EFAC's by-laws will specify that the owner of each parcel [parcel defined as a lot, or multiple lots used for a residential structure as a group, or any group of undeveloped/unimproved lots owned by the same owner] shall have one vote in any election of directors. The Conference shall have one vote for its collected ownership of undeveloped lots. An owner may be more than one individual, or a legal entity, or a trust, and the owner/owners shall designate in writing one representative to cast a vote for the parcel;

e. The EFAC will possess the right to collect reasonable attorney fees if it prevails in an enforcement action for failure to timely pay duly assessed pier fees, failure to comply with a pier assignment, or other material failure to comply with any duly enacted Court Order or rule or regulation; however, there shall be no right of the EFAC to collect attorney's fees incurred in connection with the Easement Termination Litigation, to the extent it is refilled, or in connection with any refusal to comply with a pier assignment by an Easement Termination Plaintiff during the pendency of the Easement Termination Litigation if such litigation is refilled.

f. All past-due fines or penalties relating to pier fees are waived if the underlying pier fees are fully paid by May 1, 2014;

g. The EFAC will possess the authority to levy reasonable fines for violations of policies and pier assignments and to levy reasonable late fees for failure to pay pier fees all consistent with the Court' January 21, 2014 Order;

h. The EFAC will possess the authority to place a lien on any lot in Epworth Forest to secure payment of any assessed fee and to secure a judgment obtained against a lot owner;

i. The by-laws of the EFAC will ensure that onshore owners will not be overburdened, but will also recognize that strict equality in burdening owners is not possible;

j. Onshore owners' pier assignments will continue from year to year and be presumed permanent. An offshore 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. An onshore pier assignment may be changed, in accordance with the 1994 Judgment, only upon the request in writing of the onshore owner, however, the request may be denied and then reasonableness decided based upon the current facts and circumstances;

k. Every owner that seeks a pier must show proof to the EFAC of adequate liability insurance in such reasonable amounts as determined by the EFAC;

l. The EFAC will establish a fair, timely appeal process for pier disputes that conforms with the January 21, 2014 Order part 7(g);

m. Offshore owners are required to access pier locations over rights of way;

n. No motor vehicles will be allowed on the Easement except as allowed by January 21, 2014 Order;

o. A presumption will exist of one offshore pier per onshore lot;

p. The EFAC will develop, establish and maintain community piers where possible. The general pier fees assessed to all owners shall be for the administration of pier assignments and related matters, including administration of any community pier assignments and enforcement. However, the expenses of acquiring, maintaining, seasonal installation/removal of any community pier shall be paid for separately by a fee for that purpose charged to any user of a slip or place on a community pier and not from regular pier fees. The separate fee for use of a community pier shall be in addition to regular pier fees;

q. The EFAC by-laws will ensure that the terms of Directors will be staggered and that no business shall be conducted without the presence of all 5 Directors.

(Exhibit 6).

EFAC also filed its Articles of Incorporation with the Secretary of State of Indiana (Exhibit 7) and the adopted its Bylaws (Exhibit 8). Specifically, the Bylaw of EFAC state is Section 6(c) that:

Section 6. Duties. The Board of Directors shall have the following duties.

...

(c) To ensure that offshore 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 current facts and circumstances.

(Exhibit 8).

On September 9, 2016, the trial court issued its Findings of Fact, Conclusions of Law and Judgment. (Appellant's App. pp. 27-31). In its Order, the trial court found, concluded and ordered, in pertinent part, as follows:

THE COURT FINDS:

7. The rights and obligations of non-lakefront owners of lots in the Plats of Epworth Forest have been determined by judgment and various orders of this Court in Cause No. 43C01-9109-CP-732, in particular, the Judgment entered August 2, 1994 (Exhibit 2), the Order dated November 7, 1997 (Exhibit 3), the Order dated January 21, 2014 (Exhibit 5) and the Order dated April 15, 2014 (Exhibit 6).

...

9. EFAC now administers the lakefront in the various plats of Epworth Forest including, but not limited to, assignment of pier locations for both onshore and offshore lot owners.

10. The various Orders of this Court and, in particular, Exhibit 6, states:

Onshore owners' pier assignments will continue from year to year and be presumed permanent. An offshore 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.

11. Exhibit E to Exhibit 5 is a listing of assigned pier spaces approved by the Court as part of its Order dated January 21, 2014, and specifically assigned Pier Space 35A to Plaintiffs and Pier Space 34 to the predecessor of Defendants Robert J. Miller and Debra S. Miller, Suetta Johnson. The same exhibit indicates that the lake frontage of the Miller property is 50 feet and at the time of the January 21, 2014 Order, consisted of 16 feet assigned to Plaintiffs for Pier 35A, 24 feet assigned to Suetta Johnson for Pier 34 and 10 feet of open shoreline, a total of 50 feet.

12. Defendants Miller desire to place a boat lift on each side of their pier without relocating their pier within the 24-foot space assigned to them by Exhibit 5. Doing so without relocation of the Miller pier would leave insufficient space for the Powell boat and pier as assigned by Exhibit 5.

13. The Court's Order dated January 24, 2014 approving the then existing pier assignments approved not only the then existing pier placements (actual and based on prior usage), but also the assignment of a certain location zone for pier and other equipment usage (based on actual prior usage), as noted on the list and map showing pier assignments for 2014 attached to the Court's Order as Exhibit E.

14. It was further the Court's intention, and order, that the pier assignment based on Exhibit E was assigned based on an allocation of the frontage of each lot and created a zone of use for these assignments (an actual area assignment), which would not be subject to future change except as specifically provided by the Court's Orders, as the original and subsequent assignments were controlled by frontage or footage necessarily.

15. It was further the Court's intention, and order, that each assignee of a pier assignment be free to fully and freely utilize their zone assignment, but not so that this usage would affect others, especially adjacent pier location assignments, (i.e. the pier or other equipment may be moved within the assigned area, but may not be moved to affect the use of an adjacent assigned area.)

16. Therefore, the proposed change of actual use of an area by an assignee cannot be a substantial change of circumstances making the prior assignment unreasonable under current facts and circumstances.

17. Exhibits 11 and 12 clearly indicate there is ample space lakeward from the Miller lot to allow Miller to place a 4 foot wide pier with a 10 foot wide boat lift on each side of the pier and still maintain in excess of 4 feet of open

space if the Miller pier were moved slightly west within the 24 feet of lake frontage assigned to Miller.

18. As indicated by Richard Presser, Vice President of EFAC, if the Powell pier is eliminated, they would be placed on a "waiting list" for a new pier assignment. Presser was unaware of when a new pier assignment space would be available.

19. If the Powell pier is left within the 16 feet assigned to Powell, Defendants Miller will retain the same 24 foot zone assigned to their predecessor, Suetta Johnson, and Millers are free to locate whatever structures they desired within the same 24 foot zone, so long as this does not affect the usage of the adjacent pier assignments.

20. The Court's Order of January 21, 2014 in Cause No. 43C01-9109-CP-732 established the area (zone) along the shoreline assigned to particular onshore and offshore owners. That Order was based on historic usage of the shoreline and not necessarily the exact location of a pier within the assigned shoreline.

21. Persons to whom a portion of the shoreline has been assigned are free to locate any structures within the assigned shoreline and may relocate those structures as long as they are located within the assigned area.

22. Assigned shoreline areas are based on historical usage as determined by this Court in prior Orders in Cause No. 43C01-9109-CP-732 and are not controlled by the location of platted lot lines extended to the water's edge.

CONCLUSIONS OF LAW

23. The judgment and various Orders in Case No. 43C01-9109-CP-732 of this Court clearly indicate that it was the intention of this Court that assignments of pier assignments for onshore owners were intended to be permanent, and offshore pier assignments were not to be changed without a significant change in circumstances.

24. The desire of Defendants Miler to place two boat lifts, one on each side of their current pier location, is not a significant change in circumstances.

25. The determination made by EFAC requiring Powells to remove their pier and boat lift was necessarily arbitrary and capricious and was, as a matter of the law of the case, not in conformity with the prior Judgment and Orders of this Court, the Articles of Incorporation of EFAC and the Bylaws of EFAC.

26. The placement of the Powell pier is in conformity with the Judgment and Orders in Cause No. 43C01-9109-CP-732 and no significant

change in circumstances exists which would require the elimination or relocation of the original Powell pier assignment.

JUDGMENT

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the determination made by Defendant, Epworth Forest Administration Committee, Inc., requiring Plaintiffs to relocate their pier is reversed, Plaintiffs' pier assignment as determined by this Court's Order of January 21, 2014 in Cause No., 43C01-9109-CP-732 is affirmed, and Plaintiffs are entitled to the use of their allocated waterfront area without interference from Defendants. The costs of this action are taxed to Defendants.

(Appellant's App. pp. 27-31).

IV. SUMMARY OF THE ARGUMENT

The Trial Court's Order of September 9, 2016, is clearly erroneous. The January 26, 2016 decision of EFAC ordering the Powells to relocate their pier off of the property of the Millers was a reasonable interpretation of the trial court's previous Orders and as such was not arbitrary or capricious

V. ARGUMENT

A. Standard of Review

Pursuant to Exhibit 5 "[t]he action or decision of the conference will further not be reversed unless such action or decision is arbitrary, unreasonable or capricious." (Exhibit 5). A decision "is arbitrary and capricious only where 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." *Van Vactor Farms, Inc. v. Marshall County Plan Commission, et al.*, 793 N.E. 2nd 1136, 1147-1148 (Ind. Ct. App. 2004)(quoting *Equicor Dev. Inc. v. Westfield-Washington Township Plan Commission et al*, 758 N.E. 2nd 34, 37 (Ind. 2001).

In *Indiana Civil Rights Commission v. Sutherland Lumber*, 394 N.E. 2d 949 (Ind. Ct. App. 1979), the Court of Appeals held that

Arbitrary and capricious action by an administrative agency is action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.

If a court makes special findings of fact, the appellate court reviews the findings evidence using a two-step process. “First, it must determine whether the evidence supports the trial court’s findings of fact; second, it must determine whether those findings of fact support the trial court’s conclusions of law.” *Estate of Reasor v. Putnam County*, 635 N.E.2d 153, 158 (Ind. 1994). The findings of the trial court will only be set aside if they are clearly erroneous. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *State v. Van Cleave*, 674 N.E.2d 1293, 1296 (Ind. 1996).

B. The Trial Court’s Judgment was Clearly Erroneous

The trial court’s Order was clearly erroneous in that it found the actions of EFAC were arbitrary and capricious without making any interpretation of whether or not EFAC’s interpretation of the previous Orders were reasonable. Specifically, the April 14, 2014, Order of the Kosciusko Circuit Court allows for a change in that assignment/location where there is a “substantial change in circumstances making prior assignments unreasonable under current facts and circumstances.” (Exhibit 6). EFAC, through its Board, determined that there was a substantial change in circumstances which justified having the Powells move their pier. The court held that the desire of the Millers to place two boat lifts, one on each side of their current pier location, was not a significant change of circumstances, without acknowledging EFAC’s

rationale in making that determination. Instead, the trial court created new rules for EFAC to follow and instructed EFAC repeatedly on the “Court’s intentions” with respect to its previous Orders.

Specifically, the Court stated that its intention was that “the pier assignment based on Exhibit E was assigned based on an allocation of the frontage of each lot and created a zone of use for these assignments.” (Appellant’s App. p. 29). While the Court letting EFAC knows its intention is instructive for future use, the Court’s “intentions” have no impact on whether the decision of EFAC was arbitrary or capricious as EFAC did not know the trial court’s “intentions” at the time that they made their decision.

Similarly, the trial court offers that the January 24, 2014, Order “approved not only the then existing pier placements (actual and based on prior usage), but also the assignment of a certain *location zone* for pier and other equipment usage.” (Appellant’s App. p. 29)(emphasis added). Nowhere in the trial court’s prior orders does it mention a “location zone” nor does it direct EFAC to make determinations based upon the “location zone.” In retrospect, certainly EFAC could have used this interpretation but it was not unreasonable for them to make their determination based on the actual wording of the trial court’s previous orders. Nowhere in the January 21, 2014, or the April 15, 2014, Order of the trial court does it give EFAC direction as to whether the 24 feet of shoreline allotted to an “on-shore” owner should be centered on the pier location or in a different location. (Exhibits 5 and 6). In fact, the April 15, 2014, Order of the Court states that the “on-shore owners’ pier assignments will continue from year to year and be presumed permanent.” (Exhibit 6). The Millers pier has not moved since many years prior to the April 15, 2014, Order (Tr. pp. 11, 19). As a result, if the Millers pier is presumed permanent as of the April 15, 2014, Order of the trial court, it is perfectly reasonable for EFAC to have

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determined that the 24 feet should be centered on the pier as opposed to beginning and ending through some “zone” based off of the property lines that was never spelled out in the Court’s Orders.

EFAC, by and through its Board members, as well as through the court appointed fifth Board member, Lindsey Grossnickle who offered expert testimony with respect to interpreting court orders, determined that the April 15, 2014, Order stating that the pier placements were permanent coupled with the January 21, 2014, Order which states that the “on-shore” owners “shall be allotted a pier assignment up to twenty-four (24) feet,” meant that the pier assignments should be centered on the twenty-four allotted feet. Lindsey Grossnickle testified at the hearing that her interpretation of the Court’s Order of April 14, 2014, when read in conjunction with the previous orders of this Court, was that an “on-shore” property owner’s twenty-four feet of allotted pier assignment was centered on the location of their pier.

The EFAC Committee held a hearing on the appeal of the Plaintiffs and at the conclusion of that hearing the Committee voted that the Plaintiffs would have to remove their pier. The EFAC Committee carefully considered the evidence and after discussion made their decision. There was no evidence presented that would demonstrate that the Committee willfully disregarded the facts presented by the Plaintiffs. Further, the Committee made their decision based on their reasonable interpretations of the Court’s Orders. The fact that three Board members, including attorney Lindsey Grossnickle, the court appointed fifth member of the Committee, voted in favor of the Committee’s decision, is presumptive evidence that the decision was reasonable. There was no evidence presented that the committee’s decision was an unreasonable interpretation of this Court’s previous Orders or that an honest person could not have reached the same conclusion as the Committee.

There was no evidence presented that EFAC acted willful or unreasonable in any way. In fact, based on the overwhelming evidence that was presented at the hearing, EFAC's decision was based on their interpretation of the Orders of this Court. As a member of the EFAC Board is a licensed attorney in the State of Indiana, it is reasonable for the Board to rely on her interpretation of the Court's Orders in making decisions.

“The on-shore owners have a duty to permit . . . the conference and the off-shore owners to establish piers at reasonable intervals. At reasonable intervals means that the off-shore owners and the conference piers may not be placed in such proximity to onshore owner piers as to create reasonable interference to the onshore owners in the use of their own piers.” (Exhibit 2). The “regulations as adopted and applied...should strive to (a) allow/provide for a...ten (10) foot buffer zone...between all facilities and equipment utilized on the pier sides.” (Exhibit 5). Pursuant to the rules and regulations established by EFAC: “[l]akefront owners owning at least 24 feet or more shoreline frontage shall be allotted a pier assignment up to twenty-four (24) feet.” (Exhibit 8).

The trial court stated “I guess, and what I thought was clear, maybe wasn't clear.” (Tr. p. 194). As the trial is acknowledging the potential that the previous Orders were not clear, how can it find that the actions of EFAC were arbitrary and capricious. Two Board members and the court appointed attorney Board member all agreed that the pier was the center of onshore owner's pier assignment. (Tr. pp. 79, 175, 179). Further, the court asked the question “where does it say you get to use both sides of your pier?” (Tr. p. 195). While it seems to carry weight with the Court that the order does not say you get to use both sides of your pier, it apparently carries no weight that the Court's Order does not speak to this issue at all. In no Order of the trial court does it ever say that you do not get to use both sides of your pier. Likewise, it does

not say anywhere that that the twenty-four feet of access granted an onshore owner is not centered on the pier.

Lastly, the trial court said “it doesn’t mean what people didn’t do wasn’t reasonable. I appreciate what the Board did. Was that reasonable? If I didn’t give them enough guidance, it’s not the Board’s fault. It’s my fault. I wish I was rewriting it today but we all live and learn.” (Tr. p. 195). If the actions of EFAC were reasonable, then they cannot be arbitrary and capricious. “A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency.” *Ind. Dep’t of Env’tl. Mgmt. v. Schnippel Constr., Inc.*, 778 N.E.2d 407, 412 (Ind.Ct.App.2002) (quoting Ind.Code § 4–21.5–5–14(d)(1)–(5)), *trans. denied*.

For all of the foregoing reasons, the trial court’s judgment is clearly erroneous and should be overturned by this Court.

C. When Order is Subject to Different Interpretations,
Interpretation chosen by EFAC Should be Entitled to Great Weight

The issue in this case is whether EFAC’s interpretation of the trial court’s order was reasonable or whether that interpretation was arbitrary or capricious. Under similar circumstances, Indiana Courts have held that EFAC’s interpretation of the Orders should be given great weight. In *Hoosier Outdoor Advertising Corp v. RBL Mgmt, Inc.*, 844 N.E. 2d 157 (Ind. Ct. App. 2006) the Court found and held:

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.” *Id.* at 163. Moreover, when a court determines that an administrative agency’s interpretation is reasonable, it should terminate its analysis and not address the reasonableness of the other party’s interpretation. *Id.* “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.*

While the trial court obviously disagreed with EFAC’s interpretation of the previous orders, the court also acknowledged that:

It doesn’t mean what people didn’t do wasn’t reasonable. I appreciate what the Board did. Was that reasonable? If I didn’t give them enough guidance, it’s not the Board’s fault. It’s my fault.

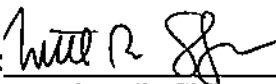
(Tr. p. 195). Once the trial court made this acknowledgement, the trial court’s analysis should have stopped pursuant to the rationale of *Hoosier*, as the Board’s decision should have been given “great weight”. *Id.* Therefore, the trial court’s judgment is clearly erroneous and should be overturned by this Court.

VI. CONCLUSION

The Trial Court’s Order of September 9, 2016, is clearly erroneous. The January 26, 2016, decision of EFAC ordering the Powells to relocate their pier off of the property of the Millers was a reasonable interpretation of the trial court’s previous Orders and as such was not arbitrary or capricious. The judgment of the trial court should be reversed and remanded with instructions to enter an Order affirming the January 26, 2016 decision of EFAC.

Respectfully submitted,

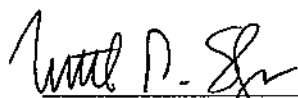
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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words and I verify that this Brief contains 8,902 words.



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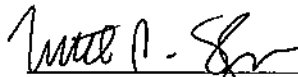
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Brief of Appellants-Defendants, Epworth Forest Administration Committee, Inc., has been served upon the following:

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